

1 IN THE UNITED STATES DISTRICT COURT

2 DISTRICT OF UTAH

3 CENTRAL DIVISION

4
5 PETTER INVESTMENTS, a Michigan)

6 corporation doing business as)

7 Riveer,)

8 Plaintiff,)

9 vs.) CASE NO. 2:14-CV-45DB

10 HYDRO ENGINEERING, a Utah)

11 corporation, et al.,)

12 Defendants.)

13 _____)

14
15 BEFORE THE HONORABLE DEE BENSON

16 -----

17 February 13, 2015

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19 Motion Hearing

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A P P E A R A N C E S

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1 February 13, 2015

2:30 p.m.

2 P R O C E E D I N G S

3
4 THE COURT: Welcome back.

5 Petter Investments, Inc. against Hydro
6 Engineering. The case number is 14-CV-45. Mr. Stephen
7 Lobbin is here along with Mark Ford and Rachel Jacques.
8 Have I said that right or have I got the wrong name
9 altogether?

10 MR. FORD: This is actually our paralegal, Jessica
11 Garcia.

12 THE COURT: I am sorry. Didn't you have Ms.
13 Jacques here yesterday?

14 MR. FORD: She was not, but she does at times help
15 out on the case.

16 THE COURT: Well, it is nice to have you here.
17 I see that your expert is here, and I
18 momentarily --

19 MR. FORD: Dr. Paulus is here.

20 THE COURT: Then on the other side of this we have
21 got the usual suspects, Mr. Miller and Mr. Foster.

22 I have forgotten the names of the brothers behind
23 you.

24 MR. MILLER: Jim and Alan McCormick.

25 THE COURT: Jim and Alan McCormick.

1 THE COURT: Am I correct that they are brothers?

2 MR. MILLER: Yes.

3 THE COURT: Nice to have you here.

4 We're here to hear argument on claim construction.

5 I would like to hear argument first on the 298 patent, and
6 then we'll move to the 720 patent and finish with the 774
7 patent, unless you disagree.

8 MR. FORD: That is fine, Your Honor.

9 THE COURT: All right. Then let's begin with the
10 298 patent and the claim construction regarding the word
11 frame. Is that a good place to start?

12 MR. MILLER: Sure.

13 THE COURT: Okay. That is the way it was in the
14 briefing, so that is how I have it outlined.

15 Mr. Lobbin.

16 MR. LOBBIN: Thank you, Your Honor.

17 Good afternoon.

18 THE COURT: Good afternoon.

19 MR. LOBBIN: May it please the Court, and before I
20 get into the specifics of the 298 patent, first, as Your
21 Honor has outlined it, I want to give a discussion of claim
22 construction principles to make sure that everyone is on the
23 same page about what the Federal Circuit requires, does not
24 require, and the rules of the road for construing patent
25 claims.

1 Your Honor I'm sure is familiar with that, but
2 these exercises in claim construction have a tendency to --

3 THE COURT: Mr. Ford looks like he wants to tell
4 you something.

5 MR. FORD: Can we just have the clerk turn on the
6 computers? We're going to be running a presentation from
7 this table.

8 Thank you.

9 MR. LOBBIN: My apologies, Mr. Ford.

10 I want to go through some very important claim
11 construction principles that are apropos to the specific
12 discussion we're having in reference to the three patents in
13 issue and the terms that have been proposed by Hydro for the
14 claim construction.

15 The first principle and a fundamental principle of
16 claim construction is that patent claims define the scope of
17 patent rights, not any specific embodiment or example of the
18 invention that is disclosed or discussed in the rest of the
19 patent including the specifications, the figures, the file
20 history, anything else. The claims are of paramount
21 importance.

22 Now, of course, the Federal Circuit says that the
23 intrinsic record of a patent to be considered when
24 construing the patent includes the patent claims, the
25 specification and the prosecution history. That is true,

1 but the claims are of paramount importance. As the Federal
2 Circuit said in the SciMed case, which we have cited in our
3 papers, the Federal Circuit described that one of the
4 cardinal sins of patent law, which is reading a limitation
5 from the written description or specification into the
6 claims. That cardinal sin is to be avoided by the parties
7 as well as the Court in construing patent claims.

8 It is important because it comes into play in just
9 about all of the claim terms that Hydro has proposed for
10 construction. Their focus is on the specification while
11 Riveer's focus is, as it should be, on the claimed language
12 that is use and that is not used.

13 The second principle that I want to highlight is
14 what does the Patent Act require a patentee to do? 35
15 U.S.C. 112 says that the patentee has to provide a written
16 description of his or her invention, as well as provide the
17 best embodiment or the best mode for using that invention.
18 Does the patentee have to do more than provide one example,
19 his best example, his or her best example? No. The
20 patentee is only required to describe a single preferred
21 embodiment in the specification, not every possible
22 embodiment that falls within the scope of the claims.

23 A simple example of this is hypothetically if
24 there is a claim term that says fastener, something that
25 fastens two things together, either cloth or plastic or

1 something, and the patentee has decided that, you know, the
2 best way to do this invention is to use Velcro, Velcro is
3 described in the specification, then the patentee has no
4 obligation to then go on to say besides Velcro you could use
5 a snap, a clip, tape, a pin, a nail or any other type of
6 fastener. The patentee has disclosed Velcro and the claim
7 term fastener is not limited to Velcro and it covers the
8 proper scope of that term, which would include any other
9 fastener besides Velcro.

10 The third principle I want to highlight, and I
11 highlighted it before but I want to emphasize it, is that
12 not only do we pay attention to the specific words used in
13 the patent claim, we pay attention to the words that are not
14 used in the patent claim.

15 Let me give you an example of this from this
16 particular case. You'll hear later about a claim term
17 adjacent, and we actually talked about this back in
18 November. The term adjacent is used in Riveer's patent
19 claims and the patentee chose not to use the word abutting,
20 which is a word that Hydro proposes that the term should
21 mean, and the patentee also determined not to use the phrase
22 immediately adjacent. The phrase immediately adjacent
23 actually appears in the specification when the patentee is
24 describing the preferred embodiment of the invention.

25 The patentee says that the trough is immediately

1 adjacent, but in the claim the patentee said adjacent, so
2 that gives us an indication that the claim scope is broader
3 than what is disclosed in the specification.

4 The fourth principle I want to highlight is that
5 if the claim language used has a plain and ordinary meaning
6 to a person of ordinary skill in the art, normally no
7 further elaboration on the meaning of that claim language is
8 necessary or appropriate, because the jury, which is the
9 ultimate arbiter of infringement, applying the construed
10 patent claims to the accused infringing device, the jury can
11 readily understand the scope and meaning of the claim
12 according to the plain and ordinary meaning.

13 The Phillips case from the Federal Circuit en banc
14 in 2005 highlights this. I am quoting. A basic principle
15 of claim construction is that the words of a claim are
16 generally given their ordinary and customary meaning. We
17 have cited the ActiveVideo case as well as the Typhoon Touch
18 Technologies case in our briefs, where the District Court
19 was affirmed in concluding that terms that have an ordinary
20 meaning don't require further construction. So on the
21 motion for claim construction, the Court's conclusion is
22 plain and ordinary meaning without more. Or another way to
23 say that is no construction required. That is all the Court
24 says.

25 That highlights Riveer's position in this case,

1 which led to the motion to compel that Your Honor considered
2 and decided and we filed our opening brief anyway. But our
3 position from the outset, and it is still today, is that the
4 plain and ordinary meaning controls and that no further
5 elaboration or construction is necessary.

6 The fifth principle is what is this person of
7 ordinary skill in the art and why is that important to claim
8 construction? The testimony from a person of ordinary skill
9 in the art is particularly appropriate to confirm that claim
10 language that is plain and ordinary actually has a plain and
11 ordinary meaning to the intended audience. Who is the
12 intended audience? With a patent it is the person of
13 ordinary skill in the art.

14 Now, with Riveer, of course, we have provided
15 detailed testimony from Dr. Paulus, whose qualifications far
16 exceed any ordinary skill in this admittedly simple
17 mechanical art, which Hydro agrees, even compared to Hydro's
18 proposed definition of a person of ordinary skill in the
19 art.

20 Hydro, by contrast, has offered no evidence
21 regarding the understanding of any person of ordinary skill.
22 They made reference to what an ordinary person of skill
23 would understand in their briefs, but they don't offer any
24 evidence to support those arguments. Thus, Riveer's
25 evidence about ordinary skill stands unrebutted. Hydro

1 never challenged Dr. Paulus by taking his deposition. Dr.
2 Paulus's qualifications as a person of ordinary skill in the
3 art are also beyond any reasonable dispute. They are
4 disputed, but the dispute is not reasonable.

5 Dr. Paulus has a Ph.D. in mechanical engineering.
6 He spent many hours developing experience with Riveer's
7 products and Hydro's products. Hydro agrees, again, that
8 this technology area is relatively simple. Even under
9 Hydro's definition, he far exceeds ordinary skill.

10 Hydro's argument is like, and I came up with an
11 analogy that I thought was helpful, and it would be like
12 saying that an airline pilot is not qualified to talk about
13 the technology of flying kites because he has never flown a
14 kite. So if the Court has any question about Dr. Paulus's
15 qualifications as a person of ordinary skill in the art, we
16 request permission today to have him testify and answer any
17 questions the Court may have about his experience and
18 expertise and whether he is a person of ordinary skill in
19 the art. Certainly we would offer to have Hydro ask any
20 questions to resolve that issue here today while he is here.

21 MR. MILLER: Your Honor, we would object to them
22 bringing Mr. Paulus up for live testimony.

23 THE COURT: Well, I don't think he is requesting
24 it. He just said that he would be available if the Court
25 has any questions. Let's just move on. I am not planning

1 on it. Let's see what happens.

2 Go ahead with your next argument.

3 MR. LOBBIN: I suppose I did equivocate my request
4 that it was subject to the Court's invitation or subject to
5 the Court's interest, but he is available.

6 The next point I want to raise is that just like
7 the person of ordinary skill in the art is considered to
8 confirm what the plain and ordinary meaning of the claim
9 terms is, the specification and the prosecution history,
10 although part of the intrinsic record, they are important in
11 a situation like this where everyone agrees to the plain and
12 ordinary meaning. The specification and prosecution history
13 are important really only to confirm that the ordinary
14 meaning of the claim terms themselves has not been
15 restricted or narrowed by the patentee, either by a special
16 definition that the patentee applies to that term or by, as
17 the Federal Circuit has said, quote, distinguishing the term
18 from prior art on the basis of a particular embodiment.

19 In the Thorner case from the Federal Circuit, 669
20 F3rd 1362, the Federal Circuit clarified that the
21 specification and prosecution history only compel departure
22 from the plain and ordinary meaning in two instances,
23 lexicography and disavowing. Now, lexicography, of course,
24 is a patentee applying a special definition, and disavow is
25 where there has been a specific disclaimer that says that

1 the plain and ordinary meaning of this claim term might
2 cover all of this stuff, but we are disavowing part of that
3 stuff so now it means something else.

4 So in this situation it is really considered as a
5 confirmation of what the plain and ordinary meaning of the
6 claim terms is, keeping the focus on, as it should be,
7 primarily on the claims itself, which Hydro does not do.
8 This is the cardinal sin. Again, the Federal Circuit has
9 said many times, quoting from Silicon Graphics, which we
10 have cited in our papers, a construing court's reliance on
11 the specification must not go so far as to import
12 limitations into claims from examples or embodiments
13 appearing only in a patent's written description, unless the
14 specification makes clear that the patentee intends for the
15 claims and the embodiments in the specification to be
16 strictly coextensive.

17 So, again, patent claims, exemplary embodiment and
18 specification with all sorts of details, and we can't import
19 those details into the claim unless the patentee has made it
20 very specifically clear that that is what he or she intended
21 to do.

22 In the patents themselves, all three patents at
23 issue here include language, and I will give you an example
24 from the 298 patent, column 5, lines 34 to 42, quoting, the
25 above description in this specification is considered that

1 of the preferred embodiment only. Modifications of the
2 invention will occur to those skilled in the art and to
3 those who make or use the invention. Therefore, it is
4 understood that the embodiment shown in the drawings and
5 described above is merely for illustrative purposes and not
6 intended to limit the scope of the invention, which is
7 defined by the following claims as interpreted according to
8 the principles of patent law including the doctrine of
9 equivalents.

10 Again, patents are to be read by a person of
11 ordinary skill in the art. So what does a person of
12 ordinary skill in the art think when they read that
13 provision in each of these three patents? They get it.
14 They get that, look, we use the example in the specification
15 as just that and the claims stand on their own.

16 Finally, the final principle which applies to a
17 couple of the claim terms here today, as the Federal Circuit
18 has made clear, quoting, a claim interpretation that
19 excludes a preferred embodiment from the scope of the claim
20 is rarely if ever correct. What that means is that if we're
21 construing the claim to include some things that not only
22 are not claimed but are not even shown in the preferred
23 embodiment, then, of course, that cannot be correct. That
24 is the Online Technologies case, 386 F3rd, 1,133.

25 Now, I mentioned before that those are the

1 principles that we have to keep in mind and, of course, the
2 primary principle is the first one I mentioned, to avoid the
3 cardinal sin of importing limitations from the specification
4 into the claim unless there is absolute clarity on that.

5 I mentioned the motion to compel that Your Honor
6 is familiar with. We filed our opening brief and Hydro
7 filed theirs and we both filed responsive briefs. All of
8 the briefing under the local patent rules has been done
9 according to Your Honor's instruction. We did that from the
10 outset. But, again, our position is that no construction is
11 required.

12 Our position in the briefing, of course, responded
13 to what Hydro put forth. Riveer put forth no construction
14 required, and Hydro put forth all of their constructions,
15 and so in the briefing -- claim construction is not an
16 exercise of the Court considering two positions and picking
17 the one it agrees with more. It is really an exercise, as
18 the Federal Circuit has said, that, for better or worse, the
19 Court has an independent obligation to get it right. If it
20 has parties that don't really get it, then the Court still
21 has to get it right.

22 In preparing our opening brief we had to consider
23 what Hydro's constructions were, and in our positions we
24 included our affirmative position, no construction required,
25 and then, in the alternative, if the Court decides that

1 elaboration is required for this claim term, then we propose
2 an alternate construction that we believe more closely is
3 faithful to the claims than what Hydro has proposed and we
4 explain why in the briefing.

5 Again, on all of these claim terms the parties
6 agree that the ordinary meaning controls. As Hydro said,
7 quoting, the language used to describe Riveer's wash rack
8 inventions in the asserted patent claims is very simple.
9 That is at Hydro's brief, page 1, I think the first line of
10 the brief. In their reply with the motion to compel at 2,
11 quoting, Hydro agrees with Riveer that the claim terms
12 should be given their ordinary meaning. So we are all in
13 agreement that all of these claim terms should be construed
14 according to their plain and ordinary meaning. Whereas
15 Riveer says that is enough.

16 Hydro goes much further and proposes what I would
17 consider to be elaborate definitions of what ordinary
18 meaning is, which is erroneously limited to the specific
19 preferred embodiment disclosed in the specification of these
20 patents.

21 Riveer, on the other hand, in their alternative
22 construction, proposed a simple rebuttal definition tied to
23 the claim language itself, not the embodiments in the
24 specification, which are exemplary and not restrictive.

25 So what are really the questions for the Court?

1 There are two. There is really one, maybe two. The first
2 question for the Court on claim construction is does the
3 ordinary meaning of these claim terms require further
4 elaboration at all? If the answer to that is yes, then the
5 second question is what should that further elaboration on
6 the ordinary meaning be?

7 We have nine terms. We'll start with the 298
8 patent. In terms of the local patent rule, 4.1-B, quoting,
9 if the parties are unable to agree upon ten terms, then five
10 shall be allocated to the plaintiff and five to the
11 defendant. Well, in this case the parties were not able to
12 agree, and Riveer has proposed that no terms require
13 construction, and Hydro has proposed nine terms, and
14 actually, as you'll see when we go through the analysis,
15 many more than nine terms, so it is Riveer's position that
16 this Court, under the local rule, this Court need not be
17 burdened with construing more than five claims, according to
18 what Hydro really wants the Court to construe.

19 There are two fundamental problems with Hydro's
20 proposed constructions that illustrate that. First, Hydro
21 includes its identified terms within its proposed
22 constructions, which is improper and is the antithesis of a
23 meaningful and helpful definition. As you can see, here we
24 have got the 298 patent highlighted, and the claim language
25 they propose to construe is frame, and their proposed

1 construction starts a weight bearing frame. So if you read
2 the proposed construction, you never find out what a frame
3 really is. That is not a helpful construction. Rarely if
4 ever does a dictionary use the term to be defined in the
5 definition. They do this with frame, bottom surface, slope
6 tray, almost all of the claim terms.

7 The problem is if you substitute Hydro's
8 constructions for the term in the claim, then other claim
9 language is rendered superfluous. The Federal Circuit has
10 said you can't do that in the Elekta case and the
11 Hyperion case. In Elekta the court said we refuse to adopt
12 claim construction which would render claim language
13 superfluous.

14 The second overall problem with Hydro's
15 constructions is that it is apparent, when you read their
16 brief and when you read their arguments, that Hydro is
17 really seeking to construe many claim terms and phrases, way
18 above nine, that, when you get right down to it, are not
19 terms that were ever identified in the local patent rule
20 disclosures prior to us filing briefs.

21 Hydro identified nine claim terms, which we have
22 seen, and then we get into the briefing and all of a sudden
23 they are wanting to construe all sorts of other claim terms
24 in phrases. Instead of just frame, they are arguing that we
25 should construe the phrase having a first wall, a second

1 wall, a third wall and a fourth wall, each having an inner
2 and outer surface. Instead of just bottom surface, they
3 want to construe the phrase extending between the inner
4 surfaces of said first, second, third and fourth walls.

5 THE COURT: Are we going to ever get to just
6 talking about these terms?

7 MR. LOBBIN: Yes.

8 THE COURT: You seem to be just flying past them.
9 You hit frame and then you go on to other examples. I think
10 I'm following your general argument, but sooner or later we
11 have got to focus on the specific claims that are at issue.

12 MR. LOBBIN: Thank you, Your Honor. I was three
13 lines away.

14 Going to frame, the term they propose for
15 construction is frame, and you can see here Riveer's
16 proposal and Hydro's proposal. The parties agree that it is
17 a simple term, having a plain and ordinary meaning. Other
18 courts have agreed. Other courts in other cases have
19 construed the word frame, admittedly in different contexts,
20 but Riveer's brief at page 7 highlights a couple of other
21 examples of where courts have said frame is a term that has
22 a plain and ordinary meaning, nothing more to be said.

23 In its alternative proposal, Riveer basically is
24 telling this Court that if the Court is inclined to
25 elaborate on what frame means, then Riveer offers a

1 dictionary definition. The Federal Circuit has said,
2 quoting the Praxiar case, that dictionaries or comparable
3 sources are often useful to assist in understanding the
4 commonly understood meaning of words and have the value of
5 being an unbiased source accessible to the public in advance
6 of litigation.

7 Although dictionaries are not intrinsic evidence
8 under the claim construction rubric, the Federal Circuit has
9 blessed them with a special character of being authoritative
10 nonetheless. I think that is probably not a point that we
11 would dispute, since Hydro also proposes some dictionary
12 definitions.

13 Hydro's proposed construction of the term frame
14 uses the term frame in it as we have seen. It is not proper
15 and it is not helpful and it renders other claim language
16 redundant and superfluous. Hydro's proposed construction
17 attempts to define the phrase inner and outer surface, which
18 is improper, because that phrase, inner and outer surface,
19 was never identified to Riveer during the exchange of
20 disclosures under the local patent rules.

21 Hydro's proposed construction, as you read through
22 the analysis, their support for their proposed construction
23 is focused entirely on the exemplary embodiment in the
24 specification of the 298 patent, nothing more and nothing
25 less. This, again, is the cardinal sin of claim

1 construction to be avoided.

2 Hydro's proposed construction of frame would even
3 exclude the preferred embodiment, which is another one of
4 those principles that we discussed that is to be avoided.
5 How would it exclude the preferred embodiment? Well, figure
6 3 of the patent shows crossbeam elements 51, and I don't
7 know if we can turn that, it is sideways, but I think that
8 it is fine sideways. Figure 3 of the patent shows elements
9 51, and you can see there there is a 51 that is a frame
10 piece going down, and 51 on the right side is another frame
11 piece going down, which shows that there are crossbeam
12 elements that make up more than just the four external walls
13 of the frame, which Hydro claims that the frame has to be
14 limited to just four interconnected walls defining a single
15 enclosed area.

16 Well, element 51 results in defining many more
17 than one disclosed area. These are frame pieces that
18 support the frame in addition to the four external walls,
19 like some of the images that we saw yesterday and some of
20 the framing elements of some of the wash racks from the
21 tutorial.

22 THE COURT: It seems like your principal
23 difference is that they want weight bearing and you don't.
24 Do you see anything else at issue here?

25 MR. LOBBIN: Well, they want four interconnected

1 walls and --

2 THE COURT: Well, the patent says having a first
3 wall and a second wall and a third wall and a fourth wall,
4 each wall having an inner and an outer surface. I don't
5 know that that adds or takes anything away. It is already
6 written in the claim itself. Maybe you have a technical
7 point that it is in the claim itself, and they are not
8 asking that to be construed, and they are using that to add
9 to their proposed definition which is a weight bearing frame
10 made up of those four walls --

11 MR. LOBBIN: Sure.

12 THE COURT: -- and not eliminating the possibility
13 that there are beams inside those four walls, I suppose.
14 But it does seem to me the difference between the two of you
15 is you want one that does not necessarily have a limitation
16 of being weight bearing.

17 MR. LOBBIN: Sure.

18 THE COURT: Okay. Can we just get down to that?

19 MR. LOBBIN: Absolutely, Your Honor.

20 THE COURT: Isn't that the fight here?

21 MR. LOBBIN: It is one of them. I have
22 highlighted a couple.

23 THE COURT: What else is there?

24 MR. LOBBIN: Well, like I said, in their arguments
25 they are talking about that the frame has to be four

1 interconnected walls, only four, and it has to define --

2 THE COURT: Well, you say only four, and I don't
3 know that that is helping me. As I read their proposed
4 construction and yours, it seems like that weight bearing is
5 the main issue.

6 MR. LOBBIN: The weight bearing issue goes back to
7 that first principle again. Let's look at the claim
8 language. The claim does not say anything about weight
9 bearing. The preferred embodiment certainly is weight
10 bearing, certain aspects of it, and if you actually read the
11 detail of the preferred embodiment, it is not necessarily
12 the frame in all instances that is bearing the weight, and
13 certainly it is within the scope of the claims of the
14 invention, the legal right that the patentee secured, to
15 have a frame that does not support any weight at all.

16 There could be other elements outside of the frame
17 that support the weight of the grate. You could have a foot
18 outside of the frame and you could have posts that support
19 the weight of the frame, and there are all sorts of other
20 embodiments where it would not be a weight bearing frame.

21 THE COURT: I am quoting from I think the plain
22 language itself or probably from the written description.
23 Preferably all parts of the modular wash rack are made of
24 steel so that parts and vehicles that weigh as much as
25 10,000 pounds may be positioned on the wash rack.

1 MR. LOBBIN: Yes. That is, again, describing the
2 preferred embodiment. I agree with you there.

3 THE COURT: It appears that it is clear that the
4 invention is intended for bearing the weight of the item to
5 be washed.

6 MR. LOBBIN: Not from the claims, Your Honor.

7 THE COURT: Well, it --

8 MR. LOBBIN: Certainly from the specifications and
9 the example given --

10 THE COURT: One of the --

11 MR. LOBBIN: -- weight bearing frame.

12 THE COURT: One of the general comments that I
13 suppose I have on that proposition is we are still
14 anticipating the claims, and the patent that is issued is to
15 give one of ordinary skill in the art the understanding and
16 the ability to know how to build this thing.

17 MR. LOBBIN: Uh-huh.

18 THE COURT: Okay. Now you want to turn it into,
19 well, not necessarily, Your Honor, not in the claims, so how
20 is one like Dr. Paulus or anyone else supposed to go out and
21 know what am I prevented from doing so as not to violate
22 this patent? It would seem to me it might be an obvious
23 question, when they look at this claim that says a frame
24 with these four walls and all the elaborate language about
25 four walls with an inside and outside surface, that a

1 question would be does it need to be weight bearing?

2 MR. LOBBIN: That is a question that may come up,
3 because there is a distinction between the claim language,
4 that says nothing about weight bearing, and the preferred
5 embodiment, which seems to clearly imply that the frame is
6 bearing the weight of the grate. There is an analytical
7 issue there.

8 THE COURT: Well, there is a question and we still
9 need to have a description in the patent from the claims
10 primarily, but then the specification isn't there for
11 nothing, and the written description for nothing, and the
12 entire idea is to give someone of ordinary skill in the art
13 an understanding of what the invention is so they don't
14 infringe it.

15 MR. LOBBIN: Yes.

16 THE COURT: When they read the word frame, they
17 need to know what it means so they don't go out and build
18 something that is infringing. An obvious question might be
19 am I infringing if I build a non-weight bearing frame? In
20 order to infringe this patent, do I need to have a weight
21 bearing frame that has this grate and the rest of the
22 components attached to it? I am not exactly sure where
23 you're going, and you can try to convince me that it is not
24 required to be weight bearing, but if we could get to that I
25 can make a choice.

1 MR. LOBBIN: Yes.

2 The principles I outlined at the beginning answer
3 the question, and the Federal Circuit's guidance answers
4 that question for us. The focus is on the claims. The
5 specification is considered to see if there is an explicit
6 definition or disavowal. For example, the patentee says
7 that the frame of the present invention -- and this is often
8 the case, so this is not a hypothetical, the specifications
9 often say something like the frame of the present invention
10 is designed to bear the weight and must bear the weight or
11 is even designed to bear the weight of whatever is on it.
12 Well, now you have something, because you have got the
13 preferred embodiment and --

14 THE COURT: But you're changing it.

15 MR. LOBBIN: -- explaining that it is coextensive
16 with what is claimed. It is redefining what the term frame
17 means in the claims from something in the specification.
18 Absent that, the Federal Circuit says the claim language
19 controls.

20 THE COURT: I would like to get to talking about
21 what we're trying to construe here. I would like to hear
22 from Mr. Miller as soon as you are finished with your
23 argument about what frame means, hear him, and then maybe we
24 can go back and forth.

25 MR. LOBBIN: Okay.

1 THE COURT: Are we done with frame from your point
2 of view?

3 MR. LOBBIN: Well --

4 THE COURT: I take it that you want me to just
5 determine or construe the frame claim to mean frame?

6 MR. LOBBIN: Frame means the plain and ordinary
7 meaning of frame, frame, yes, or no construction necessary,
8 just like in the example that I gave where the claim says
9 fastener.

10 THE COURT: I know. I have understood your
11 argument. I just want to know what you say frame means, and
12 you say frame means frame.

13 MR. LOBBIN: Essentially.

14 THE COURT: Excellent.

15 Now let me hear from Mr. Miller, and then I am
16 going to hear from you to respond to him, and then we'll go
17 on to the bottom surface.

18 MR. MILLER: Thank you, Your Honor.

19 Do you have my binder I gave you yesterday by
20 chance?

21 THE COURT: No.

22 I do, too.

23 MR. MILLER: First, Your Honor, I disagree with
24 the way Mr. Lobbin has characterized the law of claim
25 construction. I don't need to go into those principles ad

1 nauseam right now, but for purposes of frame, he said over
2 and over again that the claim does not say it is weight
3 bearing. Well, the claim does say it is weight bearing in
4 the claim itself.

5 If you look at the claim, and if you go to tab B,
6 tab B in the binder, and you go to page 2, the language at
7 the top of this page is directly quoted from claim one of
8 the 298 patent. It says that the grate, operatively
9 associated with said first, second and third and fourth
10 walls, so the grate is operatively associated. It engages
11 with these walls in some way for the operation of the wash
12 pad. What for? For supporting the item to be washed.

13 I think it is amazing that he would argue that the
14 frame of this wash pad does not have to be weight bearing.
15 That is the whole purpose of a wash pad. It says for
16 supporting the item. The grate gets its support from its
17 frame. So right there in the claim that concept is clear.
18 It does not have the words weight bearing, but Mr. Lobbin's
19 view of claim construction law where you have got to have
20 that exact word in there or you're not allowed to use it to
21 define anything is way off base.

22 The frame, if you go to the first page of tab B,
23 and I want to go over the idea of the frame, and the main
24 idea of the frame -- claim construction is an iterative
25 process. We put a definition together for this and --

1 THE COURT: It is a what process?

2 MR. MILLER: Iterative. Sometimes you start out
3 somewhere and the ultimate definition you end up with is not
4 where you started.

5 This phrase, a frame with four walls having an
6 inner and outer surface, the concept there and the key
7 element we're trying to make sure is in here is it encloses
8 an area.

9 Mr. Lobbin loves the dictionary and so let's use
10 the dictionary that Riveer cites in its pleadings. The
11 dictionary that they cite starts on our app 0020, and that
12 is the appendix page, and if you look at the definition of
13 frame, which is our app 0026, the first definition of frame
14 just says it is like a picture frame or a mirror frame.
15 That is clearly not what we're talking about here.

16 The second definition is a rigid structure formed
17 of relatively slender pieces joined so as to surround
18 sizeable empty spaces or nonstructural panels and is
19 generally used as a major support in building or engineering
20 works.

21 So this is the definition from the dictionary and
22 it talks about the concept that a frame is to surround an
23 enclosed area. If you look at the context of the patent,
24 that is what the patent is talking about. The patent is
25 talking about these four walls that are going to have inner

1 and outer surfaces. It is inherently saying that you're
2 enclosing an area. Why? Because if you read down lower, it
3 talks about how you have a bottom surface with those four
4 walls to make a basin.

5 The thing that Mr. Lobbin misses is he thinks that
6 you ignore the specification unless the words in the
7 specification say frame is defined as X, and if there is not
8 a definitional statement, then you ignore it and you don't
9 pay attention to the specification. You pull the claim
10 language out of the patent and you put it in a vacuum and
11 you go get Webster's, and then you handpick your favorite
12 Webster's definition and you don't pay attention to the
13 context of the invention. That is wrong. That is what they
14 are doing.

15 THE COURT: Could I ask you a question? Why did
16 you think that the Court needed to construe frame when you
17 show me the plain language from the claim itself to support
18 your argument that it means weight bearing?

19 MR. MILLER: Your Honor --

20 THE COURT: You show me further language in the
21 claim which says that it is supporting the item to be washed
22 above. Why wouldn't that be plain to a jury? Why do I need
23 to define frame by saying that it is weight bearing when the
24 claim itself seems to say quite plainly, as your argument
25 suggested, that it needs to support the item to be washed?

1 So why does the Court need to construe it at all?

2 MR. MILLER: One reason is --

3 THE COURT: He might be right on this one, that we
4 just give it its ordinary meaning. All this window
5 dressing, notwithstanding, but he might be right. You just
6 pick one word, that frame is frame, and we can understand
7 what frame means by reading the rest of the first claim, and
8 we don't need a construction.

9 MR. MILLER: Your Honor, I don't disagree
10 necessarily, but when I read the claim language, I think it
11 outlines in plain language, if you look at tab B, and I go
12 through this exact plain language, it outlines what our
13 definitions say.

14 Now, the reason we felt we needed to propose
15 definitions is if you go to the last page of tab B, page 5,
16 and this is kind of some excerpts from their infringement
17 contentions, and the way the local patent rules work is to
18 give everybody the context they need to pursue claim
19 construction, and you get infringement contentions from the
20 other side, and we look at their infringement contentions
21 and you'll see that they cite a lot of different beams to be
22 the frame, and kind of vaguely, and you can't really tell
23 what are they calling the four walls, and element three they
24 are calling a grate, and the top of the corrugated steel the
25 grate, the grooves in the corrugated steel they are calling

1 the basin part, and so as we look at their infringement
2 contentions, we are like they really are trying to stretch
3 this claim beyond recognition. We wanted to bring the focus
4 back to what the claims say and the proposed definitions
5 that are plain from the language that would kind of combat
6 their efforts in those infringement contentions. That is
7 the context that arose and is why we proposed the
8 definitions.

9 Today with these charts I prepared I just want to
10 emphasize the main points. One point is a frame and it has
11 to enclose an area. It encloses an area and it is weight
12 bearing. If those two concepts are in the definition, then
13 that is all we want.

14 THE COURT: As I said, it seems like you are just
15 arguing over whether it needs to be weight bearing.

16 MR. MILLER: Well, the problem is is if we don't
17 put a definition on it, based on their infringement
18 contentions, in the summary judgment context for
19 infringement they will say there is nothing in the claim
20 that says weight bearing and the Court didn't construe it to
21 be weight bearing, and the Court didn't construe it to say
22 it has to enclose an area, so there are questions of fact of
23 whether this infringes, and the purpose of claim
24 construction is to try and resolve those ambiguities in the
25 claim.

1 I wouldn't think there is an ambiguity looking at
2 this myself, but after you see how they are trying to push
3 it, there is obviously a disagreement that needs to be
4 resolved, which is a definitional question of law
5 disagreement, to make sure that this frame, that it is clear
6 that it is both weight bearing and it encloses an area.
7 There could be beams inside of that area as an additional
8 part of the frame, and we are not limiting it to four, but
9 you have got to have four that enclose an area to have the
10 frame that they claimed in their patent.

11 THE COURT: Thank you.

12 Mr. Lobbin?

13 MR. LOBBIN: Your Honor, if you don't mind,
14 Mr. Ford will take the rebuttal.

15 THE COURT: Sure. We don't usually switch
16 attorneys in midstream, but --

17 MR. LOBBIN: Your Honor, we had a plan for me to
18 do the whole thing for all of the claims, and then
19 Mr. Miller would go and then --

20 THE COURT: Okay. Well, I am happy to have you do
21 it any way you would like.

22 Yes, sir.

23 MR. FORD: I will be brief.

24 You have really identified the issues here, Your
25 Honor. The first issue is does the frame have to be weight

1 bearing, and the second issue is can it include more than
2 four framed pieces that define more than a single enclosed
3 area. If you look at Hydro's proposed construction, it is
4 pretty clear that what they are trying to say, and maybe I
5 am misunderstanding it based on what Mr. Miller said just
6 now, but based on their construction it appears to us that
7 they are trying to say that a frame can include more than
8 four frame pieces.

9 THE COURT: It can --

10 MR. FORD: And it can enclose more than one area.

11 THE COURT: Yes.

12 MR. FORD: We disagree with that.

13 THE COURT: I don't know that he said it can
14 include more than one area. As I understand their
15 construction, it does include the area within those four
16 walls.

17 MR. FORD: If you look at their construction, I
18 think their --

19 THE COURT: Isn't that right, Mr. Miller?

20 MR. MILLER: Yes. The four walls enclose an area.
21 There could be other beams within that area, but four walls
22 enclose an area.

23 THE COURT: That is how I understand their
24 proposal.

25 MR. FORD: Then I guess the question is if there

1 can be more than four frame pieces, and there can be some
2 frame pieces inside, then that necessarily means there is
3 more than a single enclosed area. There may be multiple
4 enclosed areas.

5 THE COURT: That is not their position. I think
6 their position is that you have essentially a square or a
7 rectangle and that is the frame. If you have support beams
8 connecting inside, that does not lessen the area of the
9 frame.

10 Correct, Mr. Miller?

11 MR. MILLER: Correct. That is true. In fact, the
12 four walls have to be part of the frame that encloses an
13 area.

14 THE COURT: Right.

15 MR. MILLER: I would even say that you could have
16 an octagon, which has eight walls, enclosing an area, but
17 there are at least four as part of enclosing that area. You
18 have to have at least four walls that enclose one area.

19 Now, you could have beams in the middle and if you
20 want to chop it up, but those four walls have to be part of
21 enclosing one area. The reason that concept is important is
22 for understanding the terms bottom surface and grate.

23 THE COURT: Okay. I don't see how you can have an
24 octagon. Don't say that. That confuses me.

25 MR. FORD: I suppose with that explanation, and I

1 am not sure that -- I guess the concern was that they were
2 going to say at some point, well, if their construction was
3 adopted that this frame defines more than a single enclosed
4 area because you have frame members in between that each
5 individually enclose multiple enclosed areas, so to the
6 extent that I understand their position correctly, and I am
7 not sure I necessarily disagree with the fact that, yeah,
8 there are four frame walls and there can be some in between,
9 and there is at least one area enclosed and there can be
10 multiple areas enclosed if you have --

11 THE COURT: Well, not to go too far, but it seems
12 like you want a construction that would make their side
13 trough a part of the frame and they don't because it is not
14 weight bearing. I may be wrong about that, but that seems
15 like that is what is driving this.

16 MR. FORD: Well, it may be, Your Honor, and just
17 turning to the weight bearing issue briefly, and I listened
18 to Mr. Miller's argument and he really identified one piece
19 of evidence from the patents, and he talked a lot about
20 context and that you have to read the claims in light of the
21 specification, but the one thing he identified was claim one
22 itself. He specifically identified the claim language that
23 required that the grate be operatively associated with the
24 frame walls, and that the grate supports the weight of the
25 vehicle to be washed above it. I suppose I disagree to the

1 extent that something can be operatively associated with
2 another thing without necessarily requiring that that thing
3 bear the weight of whatever it is operatively associated
4 with.

5 Now, operatively associated does not necessarily
6 mean that it has to bear the weight of the thing that it is
7 operatively associated with. Operatively associated could
8 mean that you glue two things together. I mean, it does not
9 necessarily mean that the weight from one has to be
10 transferred to the other and bear the weight of the thing
11 that is operatively associated with it.

12 THE COURT: But, again, you're describing this so
13 that the public, through the ordinary skilled person, knows
14 what not to build. I can't read this, and I am not sure I
15 agree that we need to define frame, but I can't read it any
16 other way from the patent itself that there is a grate that
17 covers it and is on top of this frame and that is what you
18 drive a truck on or whatever you're going to wash, and the
19 grate supports the item to be washed, and it is associated
20 with the four walls of the frame.

21 MR. FORD: Sure.

22 THE COURT: It is not that difficult.

23 MR. FORD: Sure.

24 Number one, I don't disagree that the term frame
25 does not need to be construed, but you identified a part of

1 the specification that said preferably the frame is -- I
2 can't remember the exact language -- preferably the frame is
3 able to bear the weight of the vehicle up to 10,000 pounds.
4 Well, I think what is critical in that passage is the term
5 preferably. A person of ordinary skill --

6 THE COURT: I am not even talking about that part
7 of it. I am just talking about the claim language itself.
8 It seems like what Riveer would like is a construction that
9 goes beyond the thing that you got that patent on back
10 whenever it was, a long time ago, to include something that
11 is not weight bearing. It is hard for me to see how anyone
12 of ordinary skill in the art would think, if asked the
13 question am I infringing if I add a side trough, for
14 example, because that seems to be pertinent here, and, oh,
15 yes, because I think frame means frame, and frame can extend
16 beyond this grate thing that is supporting a vehicle and
17 whatever you have got on the side of this description that
18 we are being given about what has been invented here, that
19 would probably be part of the frame too so you can't do
20 that, and I just can't imagine anybody saying that.

21 MR. FORD: There are two reasons why a person of
22 ordinary skill in the art may read claim one and decide that
23 it --

24 THE COURT: That broadly.

25 MR. FORD: -- that it does not necessarily need to

1 be weight bearing.

2 THE COURT: Back in 2000 or whenever this got
3 issued, or --

4 MR. FORD: Or filed in -- issued in 2000.

5 THE COURT: I knew it was a long time ago.

6 Yes.

7 MR. FORD: The first reason that a person of
8 ordinary skill in the art may conclude that is the fact that
9 the claim does not say weight bearing. The claim just says
10 frame. I think people would agree that there can be frames
11 that are weight bearing and there are frames that are not
12 weight bearing. Now, Mr. Miller identifies --

13 THE COURT: That person would read the entire
14 claim.

15 MR. FORD: Right.

16 THE COURT: Let's discount specification and
17 preferred embodiment and just reading the claim, how could a
18 person of ordinary skill in the art not come away with
19 thinking that this grate frame bottom surface thing didn't
20 require that structure to be weight bearing for the thing to
21 be washed?

22 MR. FORD: The claim --

23 THE COURT: That is the extent of the frame.

24 MR. FORD: The claim clearly requires that the
25 grate support the thing to be washed, and that the grate be

1 operatively associated with the frame, which are the four
2 walls, at least, and --

3 THE COURT: It sits on top of it.

4 MR. FORD: Right.

5 THE COURT: It rests on it and is supported by it.

6 MR. FORD: I disagree. That language is not in
7 the claim, Your Honor. It says operatively associated with
8 the frame. The grate is operatively associated with the
9 frame. There are a number of different ways that something
10 can be operatively associated with --

11 THE COURT: I will read from the claim.

12 Operatively associated with the walls for supporting the
13 item to be washed above. I don't know what is so hard about
14 this.

15 MR. FORD: Well, I disagree, Your Honor, that the
16 term operatively associated necessarily requires that the
17 thing that is operatively associated with the other thing
18 must be able to transfer the weight so that both bear the
19 weight of the first thing.

20 Secondly, going back to the specification, the
21 specification is clear. It says that preferably these parts
22 of the frame are built in a way that they can support the
23 weight of a vehicle up to 10,000 pounds. It says
24 preferably. It does not say in all instances. It does not
25 say this absolutely has to be the case. It says preferably.

1 A person of ordinary skill in the art would read that and
2 say --

3 THE COURT: But that is referring to preferably
4 they should all be made of steel. That is all that says. I
5 will read it. Preferably all parts of the modular wash rack
6 are made of steel, so that the parts and vehicles that weigh
7 as much as 10,000 pounds may be positioned on the wash rack.

8 Isn't that all we're talking about here in this
9 invention was a wash rack?

10 MR. FORD: That is right. It is a wash rack, but
11 it has lots of different components.

12 THE COURT: It has a frame, and not exactly a lot
13 of components, but it has a frame and it has a bottom
14 surface and --

15 MR. FORD: A grate.

16 THE COURT: -- and it has a grate.

17 MR. FORD: But the claim only specifically
18 requires that the grate bear the weight of the thing to be
19 washed above.

20 THE COURT: The grate appears to be completely
21 consistent with and connected to the frame.

22 MR. FORD: Again --

23 THE COURT: You don't think so?

24 MR. FORD: I think the frame -- I am sorry?

25 THE COURT: You think the frame can be greater in

1 size than the wash rack?

2 MR. FORD: Can the frame be greater in size than
3 the wash rack?

4 THE COURT: Yes.

5 MR. FORD: Absolutely.

6 THE COURT: Well, why? Just out of common sense,
7 why? This whole thing was designed to have a frame with a
8 grate on top of it that will support a truck. As I
9 understand it, you wash it and then the water and debris
10 drop down through the opening in the grate and then it can
11 be cleaned out from there or vacated from the bottom
12 portion.

13 MR. FORD: I don't disagree, Your Honor, that what
14 you are describing is the preferred embodiment that was
15 disclosed, but if you look at the claim language itself,
16 which is where the focus begins on claim construction, what
17 is the plain and ordinary meaning of those terms, and unless
18 we import limitations from the specification, we simply
19 can't get to --

20 THE COURT: Well, then virtually anything anyone
21 would build that had a larger frame or a different
22 configuration, for example, and has this side trough, I
23 mean, the human mind can only imagine all of these things,
24 and you would say then later we can claim that they infringe
25 because that frame just meant whatever your description of

1 it was, a rigid structure joined so as to provide support
2 for anything.

3 Right?

4 MR. FORD: That I believe, Your Honor, is the
5 plain and ordinary meaning of the term frame.

6 THE COURT: Well, then it would seem to me that
7 you would have the most beautiful patent in the world,
8 because you can prevent just about anybody from doing
9 anything so long as they build something with a frame or at
10 least on that part of the claim.

11 MR. FORD: Sure, but there also has to be a grate
12 that is operatively associated with the frame, and there has
13 to be a drainage fitting and a coupling means and a couple
14 tubes and a pump and there are several different elements.

15 THE COURT: I appreciate that.

16 We have spent enough time on frame. Let's move on
17 to bottom surface. We're going to have to move a little
18 faster. Your briefing has been conscientious and
19 comprehensive on this, so let's move along as quickly as
20 possible in the interest of time. I don't have a big time
21 issue, but we don't want to be here forever.

22 MR. LOBBIN: Thank you, Your Honor. I will move
23 quickly.

24 A lot of the issues tend to repeat themselves,
25 because on all claim terms the parties agree that the plain

1 and ordinary meaning applies, and on all claim terms our
2 position is that Hydro is impermissibly proposing
3 constructions that would impermissibly import limitations
4 from the specification to the claim.

5 So on bottom surface Riveer offers an alternate
6 definition, and if elaboration is necessary, again, from the
7 dictionary. Hydro's proposed construction again uses the
8 term surface and bottom, which is not proper and not helpful
9 to the definition of bottom surface and renders other claim
10 language superfluous.

11 Really what is going on when you read Hydro's
12 argument is they are attempting to have this Court construe
13 the claim phrase extending between, which is not the
14 identified term, and the identified term is bottom surface.
15 So under the local patent rules, we had no notice that
16 extending between was the real term at issue and that is
17 improper.

18 Again, reading the argument, they are focusing
19 entirely on the preferred embodiment to say what the bottom
20 surface is rather than reading the plain language, according
21 to what is a plain and ordinary meaning according to how one
22 of ordinary skill would read that language.

23 THE COURT: Thank you.

24 Mr. Miller?

25 MR. MILLER: Your Honor, I have never seen a

1 patent owner so intent to ignore the specification of their
2 own patent and their own invention.

3 MR. LOBBIN: Your Honor, could I just object?
4 There has been a few comments today about Mr. Lobbin this
5 and I have never seen this and hyperbole and being aghast at
6 certain things, and I think it is improper and I just wanted
7 to make my objection for the record.

8 THE COURT: Okay. The objection is noted. I
9 think you are both doing it. You tell me that they and the
10 Court are violating the cardinal sin of claim construction,
11 and it is all fair argument, and I am not criticizing you
12 for that, and I think he is just trying to argue that he
13 thinks you're going too far, and you are telling him that he
14 is not doing it right either. I appreciate your objection.
15 I don't think it was at all meant personally.

16 MR. MILLER: No. I said a patent owner. I was
17 not talking about Mr. Lobbin.

18 I am saying that if you look at their briefing,
19 they cite the specification of the 298 patent in their claim
20 construction briefing and in their opening brief zero times.
21 Not one time. It is because they don't want the context of
22 their invention to actually be used in interpreting their
23 claims, which is wrong. It is completely wrong on the law.

24 Bottom surface. If you look at page 1 of tab B in
25 my binder, and go down to that second half of the page, that

1 is the quoted language from the claim about the bottom
2 surface, and the main principle that that teaches is that
3 this bottom surface is the bottom surface of the frame. If
4 you look at the claim in the patent, the claim in the patent
5 has various indented paragraphs.

6 The paragraph that starts with a frame has all of
7 these things in it describing what the frame is and one of
8 them is bottom surface. So Riveer agrees that bottom
9 surface means it has to be the lowest part of something, and
10 they just use something, that it has to be the lowest part
11 of the frame. Okay. The concept that they are missing in
12 their proposed construction and that they are missing in
13 their infringement contentions is this bottom surface is the
14 bottom of the frame structure. It extends between the frame
15 walls, and because it is called a bottom surface, it has to
16 be at the bottom of the frame.

17 The reason we wanted to propose this for
18 construction is, in their contentions on page 5 of tab B,
19 they are pointing to a structure that is at the top of their
20 frame walls. They identify frame walls, but then they point
21 to the structure above them as being the bottom surface. So
22 it has to be the bottom of the frame within that area, and
23 because it says it forms a basin, it has to fill the
24 enclosed area or else it is not going to hold the water.
25 That is why we proposed the construction we did.

1 The primary elements that are important are that
2 the bottom surface is the bottom of the frame and it fills
3 the area enclosed by those frame walls. That is it. I
4 think it is plain from the language, and it is also more
5 plain once you read the language in the context of the
6 specification, which you have to do. You can't put blinders
7 on and ignore the specifications. That is legal error.

8 The Phillips decision at page 1,316, and that is
9 where it goes through and explains why the specification
10 more than just expresses definitions, but the specification
11 itself has to be used. When they ignore that, that is red
12 lights flashing, that is red flags that a patent owner is
13 trying to stretch their patent far beyond its lawful limits.

14 THE COURT: Thank you.

15 Mr. Ford.

16 MR. FORD: We just heard Mr. Miller talk about how
17 important the specification is, but I am not sure he
18 referenced the specification at all in his argument. If you
19 look at figure 5 of the specification, you'll see, and this
20 is a side view of an embodiment of the present invention,
21 and number 38 there is referring to a bottom tray. If you
22 look over on the other side at specification 40 it is a
23 trough. The specification is clear that the bottom tray --
24 so I'm reading from column 2, beginning on line 57, and it
25 says as seen in figure 4, the modular wash rack 12 includes

1 a bottom tray, 38. Bottom tray 38 has a trough. This
2 bottom tray 38 includes this surface that it is pointing to
3 and it also includes that part 40 which is the trough.

4 What is this bottom tray really talking about?
5 The bottom tray is talking about both the trough and what we
6 could call a bottom surface, which is the portion of the
7 bottom tray that does not include the trough. Mr. Miller is
8 talking about reading this claim in context, read this claim
9 in context, and I think that is really code for import
10 limitations from the preferred embodiment.

11 THE COURT: Just for my information, what is 50
12 referring to?

13 MR. FORD: 50 is called a tab or --

14 MR. MILLER: A grate support.

15 MR. FORD: A support for the grate.

16 THE COURT: Why doesn't that make his definition
17 the proper one all by itself? It seems like all they want
18 to say is that the bottom surface is underneath the grate.

19 MR. FORD: The problem with their --

20 THE COURT: Isn't that essentially what you're
21 asking me to say, Mr. Miller?

22 MR. MILLER: Yes. The bottom surface --

23 THE COURT: Is underneath the grate.

24 MR. MILLER: -- is underneath the grate and within
25 the area of the frame.

1 MR. FORD: There are really two issues, Your
2 Honor. The first thing I think they are saying is that it
3 has to be at the very, very bottom of the frame. 36-D is
4 pointing out a frame member on the side. I think if they
5 get the construction that they are proposing, they are going
6 to say, well, in order for a surface to be a bottom surface
7 it has to be below that. Not even the preferred embodiment
8 discloses that.

9 THE COURT: Below what?

10 MR. FORD: Do you see 36-D on the right-hand side?

11 THE COURT: Okay.

12 MR. FORD: That is part of the frame. That is one
13 of the frame members. In their construction they are saying
14 the bottom surface of the frame has to be the very lowest
15 part of the frame. Looking in my crystal ball, I think if
16 they get the construction they are advocating for, they are
17 going to say, well, this figure 5 wouldn't even fall within
18 the scope of the claim, because number 38, which is showing
19 the bottom surface, is not even at the bottommost part of
20 the frame. It is somewhere in the middle. Not even the
21 embodiment disclosed requires the bottom surface to be at
22 the very lowest part of the frame.

23 The second problem with their construction is they
24 are asking the Court to construe it so that it fills this
25 inner space that is defined by the four frame members. That

1 simply is not required by the claims. The claim requires a
2 bottom surface that extends between the inner surfaces of
3 the first, second, third and fourth frame walls. That does
4 not require that it fill it entirely. The word entirely is
5 completely absent from the claim. There is no requirement
6 the it entirely fill the space that is defined by the four
7 frame walls.

8 I just think that those two parts of their
9 proposed construction are not supported by the claims and
10 they are not even supported by the preferred embodiment.

11 THE COURT: Thank you.

12 MR. MILLER: Your Honor, for bottom surface their
13 proposal was that the bottom surface is the very lowest part
14 of something. That is their proposed definition. We didn't
15 have it in our original, and then in the reply we saw that,
16 the very lowest part of something and we said, well, bottom
17 means that, but we wanted to make it clear that the bottom
18 surface is part of the frame, so it has to be the bottom of
19 the frame.

20 The part about filling the area, it does refer to
21 that in the claim here. You have a bottom surface extending
22 between the walls to define a basin for collecting water.
23 If it is not filling that area and there are openings, it is
24 not going to collect water and it is going to leak out. So
25 the context of the claim, and then you go to the specs and

1 you get the context of the invention, and this is how
2 somebody would explain this system, that you put a bottom
3 surface that extends between the walls to define a basin.
4 Well, now you have a basin concept and that is why it has
5 got to fill the area.

6 THE COURT: All right. Thank you.

7 Did you have something in response to that?

8 MR. LOBBIN: I am ready to go on to grate.

9 THE COURT: Great.

10 MR. LOBBIN: Grate.

11 Like the other terms, it is a simple term and the
12 parties agree that the plain and ordinary meaning applies.
13 If elaboration is necessary, which our primary construction
14 says no elaboration is necessary, that the word grate is a
15 very simple word that the jury can understand, but, in the
16 alternative, Riveer offers a dictionary definition.

17 Hydro offers the same dictionary definition with
18 one exception. Hydro inserts the word porous, which does
19 not exist in the dictionary, into the same dictionary
20 definition that Riveer has proposed. I think it is clear
21 which one is more accurate.

22 Hydro's proposed construction attempts to define
23 the phrase operative associated which was not identified.
24 The identified term was grate. We thought all along we are
25 defining grate, and now all of a sudden we are defining

1 operatively associating, which was never identified in the
2 local patent rule disclosure.

3 Again, Hydro's argument focuses on the preferred
4 embodiment and the specification. Your Honor, I only use
5 the phrase cardinal sin because it is the phrase the Federal
6 Circuit used. I am not even sure which kind of sin that is,
7 and I grew up Catholic, so I probably should know that.

8 Even the specification never uses the word porous.
9 Porous has no association with this patent whatsoever.

10 THE COURT: There is someplace, and I am not going
11 to find it quickly, but it uses the word through, that the
12 debris is falling --

13 MR. LOBBIN: Yes.

14 THE COURT: -- through and from the grate above
15 it.

16 MR. LOBBIN: Well, actually it does not use the
17 word through. Hydro wants to use the word through. What
18 the specification and the claim actually say is that the
19 grate allows water and debris to specifically flow into, not
20 through, flow into the basin, not fall through open air as
21 Hydro attempts to require. That is at column 6, lines 13 to
22 16 of the specification, and it is also in the claim itself.
23 If you look at the claim language itself --

24 THE COURT: I have column 5, lines 8 to 10, liquid
25 drops off the dirty item through the openings of the grates

1 of the wash rack.

2 MR. LOBBIN: Column 6?

3 THE COURT: Through. You said it didn't say
4 through.

5 MR. LOBBIN: Am I misquoting?

6 THE COURT: No. Column 5, lines 8 to 10.

7 MR. LOBBIN: Column 5?

8 THE COURT: Liquid drops off the dirty item and
9 through the openings of the grates of the wash rack.

10 MR. FORD: I think you are right, Your Honor, that
11 there is some disclosure in the specification that talks
12 about water and debris dropping through the grate, but that
13 is in connection with the preferred embodiment which does
14 disclose a porous grate. If you look at the language of the
15 claim is where you will find the language about the water
16 flowing off of instead of dropping down through. I will
17 highlight it here on your screen.

18 MR. LOBBIN: I think we are all correct, Your
19 Honor. Your citation to column 5 is correct, and my
20 citation to column 6 where it says flow into is correct, and
21 my citation to the claim language itself where it says flow
22 into and not through is also correct. There is some
23 inconsistency. What does the Federal Circuit tell us when
24 there is inconsistency? We look at what the patentee put in
25 the claim and leave what is in the specification under the

1 purview of the preferred embodiment.

2 THE COURT: Okay.

3 MR. LOBBIN: Now, on grate we have cited many
4 examples of nonporous grates that the jury also will readily
5 understand. I am not sure how much of a boxing fan you
6 were, but the George Forman Grill, a very popular item and
7 every juror is going to know what that is, and it is a
8 nonporous grate. We brought a nonporous grate.

9 Mr. Petter brought this all the way from Michigan.
10 This is a grate. I think everyone will agree that that
11 shows a grate. It is not porous. Nothing falls through.
12 It falls into, and certainly you have a hamburger here and
13 the grease is going to fall off the burger and into the
14 interstices or the channels between the grate. Certainly
15 there are porous grates, but there are also nonporous
16 grates, and the claim is not limited to one or the other.

17 Now, with respect to grate, Hydro makes much ado
18 about its own patent and the prosecution history of its own
19 patent. For many reasons it would be mistaken to consider
20 that evidence. It is irrelevant for many reasons.

21 First, as a practical matter, Riveer was not
22 involved in any of those proceedings. Those were ex parte
23 proceedings where Hydro had the benefit of being able to
24 communicate with the patent office ex parte.

25 Secondly, as the Federal Circuit has said in the

1 Atlas Powder case, the seminal case from 1984, quoting, the
2 patent office has no concern with the scope of claims of a
3 prior art patent. It is concerned only with the early
4 disclosure by the specification and drawings. Patentable
5 difference does not of itself tend to negative infringement.

6 What does that mean? Well, Hydro is citing the
7 prosecution history of a later patent where the patent
8 office agreed with Hydro that you have made a patentable
9 difference over the prior art and we're going to give you a
10 patent. You have made an improvement.

11 Hydro is suggesting that that colloquy, ex parte
12 colloquy between the patent office and Hydro, suggests that
13 there can't be a match between Hydro's design and what this
14 earlier patent covers. The Federal Circuit has said, no,
15 that is error. Patentable difference does not of itself
16 tend to negative infringement.

17 As a theoretical example of this, imagine that
18 there could be a patent to a chair requiring four legs and a
19 back. Then there was an improvement of the same chair
20 adding a swivel. Well, even though the swivel was a new
21 improvement and could be entitled to its own patent, that
22 chair would still infringe the earlier patent requiring four
23 legs and a back, because it satisfies those limitations,
24 even though it added something additional. So for many
25 reasons that analysis is legally erroneous.

1 Thank you.

2 THE COURT: Thank you.

3 Mr. Miller?

4 MR. MILLER: Your Honor, a grate is porous. It
5 just is. Okay. George Forman's grill is irrelevant. This
6 patent application was filed in 1997. It says in the patent
7 this is in the field of portable wash racks. It was granted
8 in the year 2000. Now because somebody can jump on Google
9 15 years later and type in grate and see that a marketing
10 person in the George Forman company wanted to call that a
11 grate, for whatever reason, maybe to make people feel like
12 it is more like your barbecue grill that is porous, and to
13 give you the idea that this is more of a barbecue grill than
14 a griddle on your stove, who knows, but the marketing
15 personnel for the George Forman Grill using the word grate
16 15 years later is completely irrelevant to interpreting the
17 grate in this wash pad patent.

18 The specification is highly relevant. The
19 specification, as the Court quoted, says that the grate has
20 openings in it. The wash water falls through it and it says
21 that right there in describing the invention. We are not
22 importing a limitation from the claim. We are reading the
23 word grate in the context of the spec. That is what you
24 have to do. The Phillips decision, which is the --

25 THE COURT: But, of course, you understand their

1 argument and they are telling me that you're reading a
2 limitation in it that is not fair, because the claim only
3 said what Mr. Ford showed me it said, and that is that water
4 just has to run off of this surface. You know their theory,
5 that the bottom surface is like the George Forman Grill. It
6 is in the interstices, or whatever that word is, and
7 certainly if it is captured in a side trough, like
8 apparently may be the case with your alleged infringing
9 device, then they want to say that that was embodied in and
10 described by the claims in their patent.

11 MR. MILLER: That idea is in conflict with the
12 plain language of the claim. There is no evidence that they
13 have given that somebody in this field would use the word
14 grate to refer to anything but a porous grate.

15 THE COURT: In connection with this device.

16 MR. MILLER: No, in the wash rack industry.

17 THE COURT: That is what I was saying. I looked
18 up grate in the dictionary, in the only one that I have
19 upstairs, and it didn't say porous.

20 MR. MILLER: But it says a framework of parallel
21 or crossbars.

22 THE COURT: Right. It does not say porous.

23 MR. MILLER: No, but that definition implies
24 porous. You have a framework of parallel or cross bars and
25 there is going to be spaces between those bars as they

1 cross. It does not say porous, but then you look to the
2 spec to get the context.

3 THE COURT: I don't know. It seems to me in my
4 common understanding, which this is beyond extrinsic
5 evidence, but I would have guessed that you can have a grate
6 that is not porous. Don't we call those things like over
7 manhole covers grates?

8 MR. MILLER: That have holes in them, yes.

9 THE COURT: No, just the thing that maintenance
10 workers go out and put something in it to pull it up, and I
11 don't know if that is a grate or not, but --

12 MR. MILLER: I always called it a manhole cover.

13 THE COURT: Let's just assume for purposes of this
14 discussion that you can have porous grates and nonporous
15 grates.

16 MR. MILLER: Okay.

17 THE COURT: Don't you still have your same
18 argument, that this one describes a porous grate?

19 MR. MILLER: Yes.

20 Let's start with the claim language itself. The
21 grate supporting an item to be washed above said bottom
22 surface, okay, so the bottom surface is what forms the
23 basin, while allowing water and debris to flow into said
24 basin. The grate is above it and water flows into what is
25 below it.

1 Then you go to the spec to see what is this
2 invention about and let's get some context on the grate. It
3 says there are openings in it and the water flows through
4 the openings. The specification is important. In the
5 Phillips decision they talk about this cardinal sin of
6 patent law, and they have a section that talks about that
7 and they say, yes, that led to the line of cases and Texas
8 Digital that tried to focus so much on dictionary
9 definitions, and then they said that is wrong. That
10 cardinal sin of patent law language, that is not the big
11 deal that Texas Digital made it into.

12 They said sometimes there might be a fine line
13 between interpreting the claims in the context of the spec
14 and reading the limitations into the claims, but it is going
15 to be apparent that you'll see what the inventor really
16 invented. Here is a good quote they use. They say
17 ultimately the interpretation to be given a term can only be
18 determined and confirmed with a full understanding of what
19 the inventors actually invented and intended to envelop with
20 the claim. The construction that stays true to the claim
21 language and most naturally aligns with the patent's
22 description of the invention will be in the end the correct
23 construction.

24 What you have here is you have got to make sure
25 that they are not getting this construction that gives them

1 more than they invented, and they didn't invent anything
2 other than a basin with a porous grate over the top of it to
3 support the vehicles, because that was the state of the art.

4 Now 15 years later as new wash rack designs have
5 evolved they want this old, ancient patent to cover all of
6 the new designs, and that is an improper use of your patent.
7 It is an improper use of patent infringement litigation to
8 pursue that type of interpretation. It has to be a porous
9 grate. That is the only way you can look at this patent
10 rationally.

11 THE COURT: Thank you, Mr. Miller.

12 Mr. Ford.

13 MR. FORD: Two points.

14 Number one, Hydro has not come forward with a
15 single dictionary definition that includes the term porous.
16 If I had to guess, I would bet every library in Salt Lake
17 City has probably had their dictionaries gone through to
18 look for the term porous in the definition of the term
19 grate. It just is not there. I'm sure if it was, they
20 would have found it and it would have been cited to us. The
21 term porous does not exist in any definition of the term
22 grate.

23 Secondly, again, Mr. Miller uses the term context
24 and you have to look at the context of the specification.
25 That is code for you have to import limitations from the

1 specifications. In other words, they are saying look at the
2 preferred embodiment. The patentee has not acted as his own
3 lexicographer. They are not making the argument that the
4 patentee has defined the term grate to mean a porous
5 structure. They are not making the argument that the patent
6 owner has disclaimed anything during the prosecution history
7 or argued a more narrow definition of a term to get around a
8 prior art rejection. They are asking the Court to do
9 exactly what the Federal Circuit has admonished that courts
10 not do, import limitations from the specification. They
11 only identify a single piece of evidence to support their
12 porous argument and that is the preferred embodiment.

13 THE COURT: Thank you.

14 Let's move on to sloped tray. I think this is the
15 last one on this patent.

16 MR. LOBBIN: Yes, it is, Your Honor.

17 Sloped tray. This is in dependent claim four, and
18 all of the rest of the terms we have been talking about so
19 far are in independent claim one. Again, the parties agree
20 it is a simple term and the plain and ordinary meaning
21 applies. Hydro agrees.

22 This very Court actually in another case agreed
23 analogously in the CleanCut case we cited in our briefs, a
24 2012 decision, District of Utah, where the Court declined to
25 construe the term debris tray, and it is not exact, slope

1 tray and debris tray, and the key term there is tray, but
2 the Court said that the term is already adequately defined
3 by the patent claims and there is no need to provide
4 additional construction. That is just an example of how the
5 word tray has been construed to be no construction required.

6 If elaboration is necessary and if the Court finds
7 that elaboration is required, Riveer has offered a
8 dictionary definition that more closely aligns itself with
9 the claim language used. Hydro's proposed construction,
10 again, uses the term tray in the proposed construction. It
11 is not proper and it is not helpful and it renders other
12 claim language redundant and superfluous.

13 Hydro actually goes so far in its briefing, and
14 I'm not going to go through it now, but we detailed this
15 point in our briefs, quite extensively in our response brief
16 at pages 9 to 12, and they propose an embodiment that turns
17 out to be a stretch, really kind of a fabrication of what is
18 actually disclosed, and they create another element that is
19 not disclosed in the patent and use that hypothetical
20 embodiment to attempt to import a limitation that, again,
21 does not exist into the claims.

22 THE COURT: Thank you.

23 Mr. Miller?

24 MR. MILLER: Your Honor, on slope tray our only
25 point there is claim four when it talks about a slope tray

1 it adds it as an additional element to the claim. Claim
2 four depends from claim one. Claim one has already
3 identified a bottom surface. Then if you go down to claim
4 four it says said frame including a sloped tray. So now the
5 invention has to have a bottom surface and a sloped tray.
6 Our only point is that the sloped tray has to be something
7 other than the bottom surface. It didn't say wherein the
8 bottom surface is a sloped tray in that claim. It said
9 wherein the frame includes a sloped tray. It is just
10 another thing. We just think that the sloped tray cannot be
11 interpreted to be the same structure as the bottom surface.
12 It has to be an additional element. That is our only point.

13 THE COURT: All right.

14 MR. LOBBIN: We can move on, if Mr. Miller is okay
15 with that --

16 THE COURT: Okay.

17 MR. LOBBIN: -- to the next patent, but just a
18 very, very brief statement. We believe, as we have said in
19 our briefs, that sloped tray can be part of the bottom
20 surface when read in the appropriate context in claim 4.

21 I think the 720 was next?

22 THE COURT: The 720, if you don't mind, yes.

23 MR. LOBBIN: Okay. 720.

24 With the 720 patent there are two claim terms in
25 dispute. Again, reserving our argument that only five

1 should be in play here, according to the patent local rules,
2 five total, and the first is a side trough adjacent to the
3 wash floor. The parties agree, again, it is a simple phrase
4 having a plain and ordinary meaning. If elaboration is
5 necessary, Riveer, again, offers a dictionary definition.

6 Hydro, on the other hand, would change the word
7 adjacent to the word abutting, but that word was never used
8 in the patent. As I explained in my opening remarks talking
9 about the principles of claim construction, I gave this as
10 an example where the patentee chose the word to use in the
11 claim, and the patentee chose adjacent, and the patentee
12 chose the phrase not to use in the claim, and the phrase
13 that the patentee chose not to use was immediately adjacent.

14 Immediately adjacent was a word that the patentee
15 used in the specification to describe the preferred
16 embodiment, but when it came time to draft the claims the
17 patentee decided, do you know what, I am not going to use
18 immediately adjacent in the claim because immediately
19 adjacent describes a preferred embodiment. I want to have
20 claims that give me legal rights broader than this preferred
21 embodiment, which is naturally what the patent process is
22 typically about. So the patentee chose to use the word
23 adjacent and chose not to use the word immediately adjacent,
24 and certainly chose not to use the word abutting.

25 Again, Hydro's proposed construction uses the side

1 trough and wash floor terms that they are trying to define.
2 So, again, it is redundant and not helpful and not proper.
3 Here, again, we see a secret phrase or a phrase that wasn't
4 identified in the local patent rule disclosures, that when
5 you get into the briefing really, this is what they are
6 trying to construe, and the phrase is disposed in fluid
7 communication with, which was never identified in the patent
8 rule disclosures.

9 Again, the focus of their argument is on what is
10 in the specifications specifically as the preferred
11 embodiment, including the term immediately adjacent.
12 Hydro's argument is that, well, adjacent does not mean
13 adjacent, even though that is what the claim says, it means
14 immediately adjacent, which is what the specification says.

15 Finally, in deposition testimony one of Hydro's
16 employees, key employees in describing the accused
17 infringing product, one of the accused infringing products
18 said, and I quote, in that product fluid and debris flow
19 down the trough to the connection pipe by gravity and
20 through that pipe into the adjacent drive and cleanout pit.
21 In his testimony he decided to use, and probably just
22 because it was the appropriate term, but to use the same
23 term that is in the claim.

24 THE COURT: This invention, as I understand it,
25 the novel feature of it in the end was the placement and

1 configuration of the guide rail, correct?

2 MR. LOBBIN: The fact that you have a cleanout
3 tray, a side trough that is big enough to allow a small skid
4 steer or a bobcat to --

5 THE COURT: And you don't want that skid steer
6 machine to go onto the wash floor, I take it?

7 MR. LOBBIN: Of course. You want it to be
8 contained within that area where the mud ends up being --

9 THE COURT: That is why you have the guide rail --

10 MR. LOBBIN: Correct.

11 THE COURT: -- to keep the skid steer loader where
12 it is supposed to be and not over onto the wash floor?

13 MR. LOBBIN: Correct, and appropriately positioned
14 within that tray.

15 THE COURT: That is why you have the guide rail,
16 so it does not stray off onto the wash floor?

17 MR. LOBBIN: Well, so it does not stray off into
18 whatever it is next to.

19 THE COURT: Well, and that is not anticipated to
20 be the wash floor?

21 MR. LOBBIN: Well --

22 THE COURT: Isn't all of the wash water and debris
23 coming off of the wash floor?

24 MR. LOBBIN: In the preferred embodiment yes, it
25 is.

1 THE COURT: Anybody building something that they
2 think would infringe, why wouldn't they build it right up to
3 the guide rail? That is what I don't understand.

4 MR. LOBBIN: To try to avoid the patent. That is
5 what Hydro did. They tried to move it away from directly
6 abutting the wash pad and move it a few feet away and all of
7 a sudden you avoid the infringement.

8 THE COURT: Where would the debris and wash water
9 go then? I guess there could be different places it could
10 go depending on how it was manufactured.

11 MR. LOBBIN: Just as in the accused product, the
12 debris and wash water go into a side trough and through a
13 pipe right into the side trough. It is just one step
14 removed from being immediately adjacent, as the preferred
15 embodiment is, so now it is not immediately adjacent
16 anymore, but that is not what the claim requires.

17 THE COURT: Okay. Mr. Miller.

18 MR. MILLER: That also means it is no longer a
19 side trough, because it is not this side trough. It is
20 away.

21 The point that the Court just raised, I want to
22 point out a piece of file history, prosecution history that
23 is not emphasized in our brief. It is on the appendix page
24 325 for the joint appendix, and in the briefing we
25 identified how they had to amend the guide rail limitation

1 three times. They kept getting rejected and rejected and
2 they said, well, the guide rail guides the skid steer
3 loader, and then they had to say, well, the guide rail has
4 openings to allow wash water to flow through it. Then they
5 said the guide rail separating the side trough from the wash
6 floor, and they added that language on their third
7 amendment, and this is how they explained that amendment.

8 This is appendix page 325 at the bottom of the
9 page, applicants have found that the claimed location of the
10 guide rail, so what we have said in these claims about the
11 location of the guide rail, provides a dual function of
12 guiding the skid steer through the trough and providing a
13 safeguard or barrier for persons washing items on the wash
14 rack.

15 Now, if the trough is not right up against the
16 wash rack where the guide rail is, that guide rail is not
17 providing the dual function that they told the patent
18 examiner and everybody else looking at this patent, this
19 guide rail has a dual function of not only guiding the skid
20 steer, but also providing a safeguard or barrier for the
21 people standing on the wash rack. If the guide rail is way
22 over here and the people are over here washing, it is not
23 providing any safeguard. That is why there has to be an
24 intersection with the side trough and the wash rack and the
25 guide rail is right there.

1 THE COURT: Why did you propose the word abutting?
2 Why not immediately adjacent?

3 MR. MILLER: Well, let's start where Riveer likes
4 to start and that is with the dictionary.

5 THE COURT: Well, they used the words immediately
6 adjacent in the written description.

7 MR. MILLER: Sure. In the context of the written
8 description they are talking about wash water, and the wash
9 rack is designed to allow wash water to escape the wash
10 rack, and that is what it says, and then it says the wash
11 water goes into the side trough. That is why they have to
12 be adjacent, because as the wash water leaves the wash rack,
13 it goes into the side trough, and it talks about by force of
14 gravity, and the whole waterfall concept that we talked
15 about yesterday, and --

16 THE COURT: Right. I am just wondering why you
17 didn't use immediately adjacent. Does it matter?

18 MR. MILLER: It does not matter. We used abutting
19 because I think it just paints a better picture. The
20 dictionary identifies abutting as a synonym of adjacent.
21 That is on our app 0022, page 22 of Riveer's appendix, claim
22 construction appendix. It is a synonym of adjacent. In the
23 context of the patent that is what it says. If immediately
24 abutting would be better, as long as that concept --

25 THE COURT: Now you want immediately abutting.

1 No. I said immediately adjacent. I didn't see the
2 difference between abutting and immediately adjacent.

3 MR. MILLER: In the context of this patent you can
4 tell that there is no difference between adjacent and
5 abutting. If the Court construes it to be immediately
6 adjacent rather than abutting, that is fine. It is the same
7 thing. You get to the same result.

8 THE COURT: Thank you, Mr. Miller.

9 Response?

10 MR. FORD: Just two points, Your Honor.

11 That portion of the prosecution history that they
12 cite to, I don't disagree that the function of a guardrail
13 to protect somebody that is on top of the wash rack washing
14 a car, that can be accomplished even if the side trough is
15 not abutting the wash rack. With adjacent, there are some
16 graphical restrictions on adjacent, but we are saying it
17 does not have to be touching and right up next to, forming
18 an intersection with. I think it is fair to say that the
19 claim language is broad enough to include a system where you
20 have the side trough a little ways away but not necessarily
21 touching or at an intersection with the wash rack.

22 If you look at claim 18 of this patent, you'll see
23 that claim 18 is dependent on claim one, which means that it
24 has to be more narrow than claim one, and it recites wherein
25 the guide rail is provided at an intersection between the

1 wash floor and the side trough. That claim implies that
2 claim one, from which claim 18 depends, is more broad and
3 does not necessarily have an intersection between the wash
4 floor and the side trough.

5 THE COURT: Thank you.

6 MR. FORD: One more point. I apologize, Mark.

7 In our briefing I think we identified that as
8 claim four. I just wanted to make it clear that it is
9 actually claim 18 where that dependent claim is found that
10 requires there to be an intersection. I apologize.

11 THE COURT: Thank you.

12 Yes.

13 MR. MILLER: I just want to point out that in my
14 binder here under tab C, and if you go to page 5, for this
15 dual function, and Mr. Ford says that they don't disagree
16 that it requires a dual function, the structure in their
17 infringement contentions they identify as a guide rail is
18 not even a rail, but I don't understand how he was
19 explaining how it could serve the function of being a
20 safeguard to people on the wash rack. If you look on page
21 5, what they call a guide rail, how does that safeguard
22 anybody standing on the wash rack?

23 The only way it is a safeguard is if it is right
24 at the edge of the wash rack to keep people from going over.
25 If the guide rail is at the edge of the wash rack, the side

1 trough has to be right up against it for the guide rail to
2 do anything on guiding the skid steer loader. It does not
3 make sense unless they are abutting or immediately adjacent.

4 MR. FORD: Briefly, Your Honor, and I don't know
5 if you have ever driven a bobcat, but they are squirrely,
6 and the fact that you're not right up next to it does not
7 mean that if a bobcat jumps the rail it is not going to
8 present a danger to somebody that is a few feet away. If
9 you have a bobcat inside of a trough and it is contained
10 within that trough via some guide rails, that is going to
11 protect people not just that are on a structure that is
12 immediately abutting that, but it is also going to protect
13 people that may be a few feet away.

14 THE COURT: Thank you.

15 Let's go to the next one which is a guide rail
16 separating the side trough from the wash floor.

17 MR. LOBBIN: Thank you, Your Honor.

18 This one we have already touched on a little bit
19 in the prior discussion. Again, the parties agree that the
20 plain and ordinary meaning applies. If any elaboration is
21 necessary, Riveer has offered in its alternative
22 construction a dictionary definition which comports with the
23 claim language. Hydro's proposed construction, again, uses
24 the guide rail and side trough and wash floor terms to be
25 defined. It is not proper to do that and it is not helpful

1 and it renders the other claim language redundant and
2 superfluous.

3 Their analysis focuses entirely, again, on the
4 preferred exemplary embodiment which is improper. Again,
5 claim 18, specifically under the doctrine of claim
6 differentiation, claim 18 specifically claims what they want
7 to limit claim one to, which is a guide rail located, quote,
8 at an intersection between the wash floor and the side
9 trough. So under the doctrine of claim differentiation, the
10 doctrine requires that claim one not be limited to the
11 narrower scope of claim 18.

12 THE COURT: Thank you.

13 How is this different from the last one?

14 MR. MILLER: It is pretty much the same argument,
15 Your Honor, the location of the guide rail. The claim
16 differentiation argument they make, there is plenty of case
17 law and we cite it in our briefing, that doctrine is a rule
18 of thumb, and it is not a hard-and-fast rule, and that is
19 the language that the cases use, and if you have got file
20 history or specification that shows that it has to be at
21 that intersection, then that trumps it and the claim
22 differentiation doctrine evaporates after that, because we
23 have got a file history statement that says that those dual
24 functions need to be there.

25 Plus, our proposed definition does not say it has

1 to be at the intersection. It says positioned near the
2 intersection to divide the side trough from the wash floor.
3 There is a difference in claim scope, and if the
4 intersection is right along here in the middle, and the
5 guide rail is attached right here, or the guide rail could
6 be attached inside of the side trough right here, or it
7 could be attached right at the intersection, which is what
8 the dependent claim said, so there is a difference in claim
9 scope between our proposed definition and that dependent
10 claim, so the doctrine of claim differentiation does not
11 even come into play to begin with.

12 THE COURT: Thank you.

13 Your response, Mr. Ford.

14 MR. FORD: Just briefly, Your Honor.

15 Maybe I misheard Mr. Miller, but I think he just
16 said that the wash floor and the side trough may not
17 necessarily be right up next to each other to create an
18 intersection. He said it just has to be near the
19 intersection, but in their construction of the last term it
20 clearly requires an abutment which requires an intersection
21 and touching.

22 He says that a guide rail positioned --

23 THE COURT: He confused me a little bit on that,
24 too. Explain that again, Mr. Miller.

25 That confused me slightly, too.

1 MR. MILLER: If we can leave this graphic up, this
2 will be helpful.

3 MR. FORD: Sure.

4 MR. MILLER: We are saying a guide rail positioned
5 near the intersection of the side trough. Okay. The
6 dependent claim we're talking about is claim -- which claim
7 is it, Mark?

8 MR. FORD: 18. The last one.

9 MR. MILLER: No, we are on the 720 patent. I
10 apologize.

11 MR. FOSTER: By the way, while he is looking, with
12 the abutting you're going to have the trough abutting the
13 wash surface, and the question is where is the rail. Is it
14 right where they are abutted or is it a little bit into or a
15 little bit out of --

16 THE COURT: And that is the reason for near. I
17 think that explains it.

18 MR. MILLER: The doctrine of claim differentiation
19 only applies when the only difference between the
20 independent claim and the dependent claim is that one
21 feature. Well, the difference between 18 and claim 1 is not
22 that there is an intersection between the side trough and
23 the wash rack. The difference is that the guide rail is
24 located at that intersection. That is what the dependent
25 claim adds is the location of the guide rail.

1 What they wanted to argue on claim differentiation
2 is that because there is a reference to an intersection
3 here, there can't be an intersection in claim one, but that
4 is not what claim 18 is adding to the claim. It is adding
5 the location of the guide rail, and that location in our
6 proposed definition is near the intersection, which could be
7 on either side, and this claim requires it to be right at
8 the intersection, but in either case there is always an
9 intersection between the wash pad and the side trough. That
10 is why claim differentiation does not fly for their
11 proposal.

12 THE COURT: Thank you.

13 Mr. Ford, we interrupted you.

14 MR. FORD: That is okay. I just have one more
15 quick point, and that is that their proposed construction is
16 a guide rail position near the intersection, and that
17 obviously implies that there exists an intersection, and it
18 is our position, for the reasons that we have already
19 stated, that there does not have to be an abutment or a
20 touching between the wash floor and the side trough
21 according to the plain language of the claim.

22 THE COURT: Thank you.

23 MR. LOBBIN: One final point?

24 THE COURT: Now we are moving on to the 774
25 patent, and I want to take a short break, but I want you,

1 Ron, to see if we have got that other matter ready. Okay.
2 I had a former legal intern who asked to be sworn into the
3 bar today, and she has her family with her and we thought we
4 would be done with this by 4:30 and it is 4:30 right now. I
5 have asked Ron to go check on that. She has some family
6 members and she wanted to do it in the courtroom.

7 Could I ask that we recess on this matter for 20
8 minutes, and you have been here a long time, and that will
9 give you a chance to take a break, a restroom break or
10 whatever you need, and we'll try to start right back in at
11 10 minutes to 5:00.

12 MR. LOBBIN: Can we leave our things here?

13 THE COURT: Yes. Leave everything right where it
14 is. If you will accommodate her on this, I think she should
15 be here any minute.

16 Court is in recess.

17 (Recess)

18 THE COURT: Thank you for accommodating me on
19 that. She got sworn in and we're ready to go on the 774
20 patent.

21 Mr. Lobbin.

22 MR. LOBBIN: Thank you, Your Honor.

23 If you will indulge me just very briefly with a
24 quick point about your earlier question of Mr. Ford, and you
25 asked if there is a frame that is not weight bearing, and on

1 the break, since we had time, figure 4 of the patent, if I
2 can show you, shows these four support members. These are
3 support members 51 from the specification and those are
4 internal. They are not the walls of the frame. They are
5 internal. Those are the only members called out by the
6 patent specification that support the grate. Okay. The
7 grate is actually not sitting on top of the frame walls.
8 The grate in the preferred embodiment is actually sitting on
9 top of those support members and is seated inside in a
10 seating fashion inside the perimeter of that frame. I just
11 want to clarify that figure 4 and the support members answer
12 the question of, hey, where is this embodiment where the
13 frame is not weight bearing, and that is actually what the
14 preferred embodiment is and that is how the invention
15 worked.

16 Going to the 774 patent, and this is the conveyor
17 patent, and the first term for construction, and there are
18 three, and the first term Hydro proposes for construction is
19 the evacuation end, and, again, the parties agree it is a
20 simple term having a plain and ordinary meaning. Riveer
21 proposes if any elaboration is necessary, a dictionary
22 definition should suffice. Hydro's proposed construction,
23 again, uses the word end in the proposed construction of the
24 claim term for construction, which is evacuation end, so
25 there is a redundancy there that is similar to the others.

1 Really if you look at the analysis in their brief,
2 the proposed construction that Hydro really wants this Court
3 to undertake is to further define the phrase, quote,
4 disposed in fluid communication with, which was never
5 identified for construction and we believe would be improper
6 to construe.

7 Again, going back to the first point that I made
8 today when I first stood up to talk, the problem and the
9 balance in claim construction of construing claims in light
10 of the specification after reviewing the specification and
11 prosecution history is fine, but reading limitations from
12 the preferred embodiment into the claim is not. That is
13 exactly what Hydro has proposed to do here. They admit that
14 the focus of their analysis is entirely on figure 6 of the
15 774 patent.

16 Their argument is basically that whatever the
17 claim means, it has to be limited to figure 6 of the 774
18 patent. There is no evidence in the specification or the
19 file history that the patentee was disclaiming anything but
20 what is in figure 6. The claims, in fact, already define
21 the positional relationship between the evacuation end and
22 the evacuator and the elevator as being disposed in fluid
23 communication with, and that is in our opening claim
24 construction brief at 13 to 15.

25 Riveer never limited the claims to the embodiment

1 depicted in figure 6. In fact, the patent specification
2 states that in the example embodiment, referring to figure
3 6, the evacuator 320 is joined to evacuation end 311. That
4 is at column 7, lines 61 to 62. Riveer did make a claim
5 amendment in the prosecution history, but only to require
6 the evacuator to be disposed in fluid communication with an
7 evacuation end. There is no evidence in the file history
8 that Riveer assented to the examiner's suggestion of, well,
9 maybe figure 6 is an appropriate way to amend the claims.
10 That was a suggestion and Riveer made its own amendment
11 according to what it believed was proper.

12 The claim differentiation argument here that is
13 appropriate and that we have made in our briefs, similar to
14 the one we discussed earlier, is that dependent claim 8,
15 which we have not asserted in this case, because dependent
16 claim 8 specifies that the same evacuation point for wash
17 water and solid debris is in the same location, the same end
18 of the trough. So claim differentiation requires that
19 independent claim one is not so limited, allowing the
20 evacuator and the elevator to be at opposite evacuation
21 ends, which is what the infringement case is all about and
22 is what is driving claim construction here.

23 Hydro's accused product takes the solid debris out
24 of one end of the trough and takes the liquid debris out of
25 the other end of the trough, and they are attempting to use

1 the specification and the exemplary embodiment to limit the
2 scope of the claim terms so that Riveer's patent is limited
3 to that situation, and it is not as evidenced by dependent
4 claim 8.

5 THE COURT: Not that I see necessarily how
6 important it is, but what would you say is the novel feature
7 of the 774 patent? What was it that made it an advancement,
8 however incrementally, over the prior art?

9 MR. LOBBIN: The use of the conveyor to
10 conveniently separate the fluid debris from the solid debris
11 and elevate it such that it drops into and can be dried and
12 evacuated that way, as opposed to the prior art where the
13 side troughs were cleaned out by -- we have seen the skid
14 steer loader with the wide trough or just the basic manual
15 labor of getting a shovel and --

16 THE COURT: So the first time there was a conveyor
17 and an elevator system to get it up to a height where it
18 could be dropped into a waste reciprocal or truck?

19 MR. LOBBIN: That is exactly right.

20 THE COURT: The first time, really?

21 MR. LOBBIN: The first time.

22 THE COURT: Okay.

23 MR. LOBBIN: With all of the other claim elements.

24 I am not saying that it was --

25 THE COURT: Something had to make it patentable.

1 MR. LOBBIN: The claim itself and all of the
2 features included in the claim, which included the ability
3 to easily separate and scrape solid debris and separate it
4 with a filtration mechanism from the liquid debris, having
5 flights on the conveyor to automatically bring that solid
6 debris through the trough and up the elevator and to dump it
7 into a hopper.

8 THE COURT: As you know, Hydro is quoting from the
9 prosecution history to tell me that the examiner, and I am
10 quoting from page 25 of their brief, indicated that the
11 evacuator would need to be more narrowly recited to
12 distinguish over the prior art and, quote, that reciting the
13 two conveyors and their orientations and their relative
14 positioning to the debris collector as shown in figure 6
15 would distinguish over the prior art. That seems narrower
16 than what you just told me was novel about this invention.

17 MR. LOBBIN: Well, right. The examiner, quite
18 frankly, didn't understand the invention and got it wrong,
19 and the patent office made a suggestion for how he or she
20 believed a patentable distinction could be made, and with
21 that suggestion, as Hydro admits, the examiner indicated,
22 and the examiner didn't require, an amendment was
23 subsequently made and the patent was allowed.

24 THE COURT: Well, they claim that it was required,
25 that this was the only way and this telephone call was what

1 allowed the patent office examiner to allow the patent to go
2 forward, and that it had been previously rejected they claim
3 on Hydro's prior art.

4 MR. LOBBIN: Right, but you have to look at not
5 what the examiner thought was allowed but what Riveer
6 actually did. So they took the examiner's suggestion and
7 they considered it, and then they --

8 THE COURT: They didn't do it. They didn't do
9 what was suggested but did something else and still got a
10 patent.

11 MR. LOBBIN: They didn't do it all to the extent
12 that the examiner suggested, because the examiner was being
13 overly broad, and examiners have a job to do and they want
14 amendments and they want limitations and they want to allow
15 patents, but the exercise of patent prosecution is to take
16 what the examiner is suggesting you do, A, B, C and D, and
17 maybe do A and B, because you believe that A and B and those
18 amendments are enough to get you past the prior art.

19 That is exactly what happened here. Riveer made
20 an amendment that required the evacuator to be, quote,
21 disposed in fluid communication with an evacuation end.
22 They didn't make an amendment that was on all fours with
23 what the examiner said because it was not necessary.

24 THE COURT: All right. Thank you, Mr. Lobbin.

25 Mr. Miller.

1 MR. MILLER: Thank you.

2 Your Honor, I will pick up with that prosecution
3 history to start. I disagree with Mr. Lobbin. It is not
4 enough to say, well, we think the examiner was wrong. The
5 purpose of the prosecution history is public notice. A
6 person of ordinary skill in the art is entitled to read this
7 and draw a conclusion. It says at one point, and if you go
8 to tab D in my binding on page 4, and the interview summary
9 you just quoted the examiner said this is what we talked
10 about, and I said you can get over the art this way.

11 Now you can go to page 5, and this is a little
12 depiction of the amendment they actually made. What did
13 they add? They added a reference to any evacuation end.
14 The only time that the patent specification refers to an
15 evacuation end is in reference to figure 6 and the
16 configuration of figure 6. This is after the examiner said
17 make sure that you follow figure 6 and you can get over the
18 prior art. Then they add evacuation end.

19 But, look, they also add that last clause about
20 the conveyor that is underlined. That clause says at the
21 very end of it, it says that the conveyor moves wash fluid
22 and debris collected in the catch trough to the evacuator,
23 right, and it elevates the debris from the evacuator to a
24 dump height, which means the elevating part is coming from
25 the evacuator. That is what figure 6 shows. You have got

1 the evacuator there and you have got the elevator attached
2 to it. When it says that you're elevating the debris from
3 the evacuator, they made an amendment that recites the
4 structure of figure 6, just like the examiner said, and the
5 public is entitled to rely on that in understanding the
6 metes and bounds of this claim. That is what they did.
7 That is what their patent is limited to.

8 You asked about what is novel about this patent.
9 Hydro had a patent with an elevator and a conveyor in it
10 before and that was cited as prior art in this prosecution,
11 as the Court knows. When you're in a field that is crowded
12 and there are a lot of people that have done similar things,
13 you're appropriately given a very narrow scope of a patent.
14 If their scope is limited to figure 6, that is because they
15 were not the first ones to think of using a conveyor with a
16 wash rack, and they were not the first ones to think of
17 using an elevating conveyor with a wash rack and dumping it.
18 They were not the first ones.

19 Maybe they were the first ones of doing that
20 specific configuration that was even in their marketing
21 video yesterday that showed the evacuator that pulls the
22 liquid out, right there connected to the elevator that
23 elevates the solids, and they are both connected and at the
24 same end. That is what they are limited to.

25 That makes sense if you just read the plain

1 language of the claim. Let's go to page 1 of tab D. If you
2 go to page 1 of tab D, this is language that is just
3 straight from the claim. This kind of describes the
4 invention in the same context of, you know, your foot bone
5 is connected to the anklebone, which is connected to the
6 shinbone, and that is how they do it. They start with the
7 catch trough which is in fluid communication with the wash
8 floor. That is because when water leaves the wash floor it
9 enters the catch trough. It is in fluid communication
10 because when it leaves one it enters the other.

11 Next it says that the evaluator is in fluid
12 communication with an evacuation end of the catch trough,
13 because as it leaves the catch trough, it enters the
14 evacuator on the next page. Then it says that the elevator
15 is in fluid communication with the evacuator, not the catch
16 trough, not the wash floor, the evacuator, the elevator,
17 because when it leaves the evacuator, the red component, it
18 enters the elevator.

19 That is just a plain reading of the claim. It
20 never says the elevator is in fluid communication with the
21 wash floor. It never says that. Just because water can
22 flow from the wash floor and eventually make it to the
23 elevator does not mean it is in fluid communication. This
24 patent uses that term to refer to components that are
25 connected to each other so that when liquid leaves one

1 component it is entering that other component. That is how
2 it describes it. That is why we proposed the definitions
3 that we did.

4 Finally, on the next page, page 3, we have some
5 excerpts from the patent which show how the patentee used
6 that phrase with reference to figure 6. It says here
7 referring to figure 6, first it says that the catch trough
8 of the trough assembly is in fluid communication with the
9 evacuator. So here they are saying that the evacuator and
10 the catch trough are in fluid communication.

11 Then you go down to the next full sentence where
12 it says in the example shown, and they are still talking
13 about figure 6, and now they state it a little differently.
14 The evacuator is joined to an evacuation end of the catch
15 trough. So right there in that small paragraph describing
16 figure 6 they use in fluid communication synonymous with
17 joined. The evacuator is joined to the catch trough and the
18 evacuator is in fluid communication with the catch trough
19 and they are the same thing in the context of this patent.
20 That is why you start with the claim language and you move
21 to the spec, you pay attention to the file history, and
22 dictionaries are the last resort.

23 The evacuation end is what the patent owner used
24 to identify the end of the trough where everything is
25 evacuated. Everything. That is the evacuation end. The

1 patent also talks about the other end as the free end. When
2 they added evacuation end to the claim language, they were
3 limiting it to figure 6.

4 When they talk about the elevator being in fluid
5 communication with the evacuator, they are talking about
6 them being joined, so that when something leaves the
7 evacuator it enters the elevator. Those two limitations and
8 our proposed definitions are in perfect harmony with the
9 specification and with what they actually invented and with
10 the scope that they are entitled to.

11 THE COURT: Tell me how you interpret, and on your
12 page 3 there is a sentence in there that I don't understand,
13 and it says, however, in other examples the evacuator can be
14 disposed anywhere along the catch trough.

15 MR. MILLER: Right.

16 At the time they filed this application, and this
17 is how patent applications work, when you file them you
18 draft them broadly and you put in language like this. Well,
19 it can also be broader, there can be other configurations,
20 but then when you get into the prosecution of it with an
21 examiner, sometimes, and this is one of those times, in
22 fact, oftentimes, you have to go more narrow than what you
23 have described. Here they are saying in figure 6 the
24 evacuator and the elevator are all at one end here.

25 THE COURT: But that is just possibly the

1 preferred embodiment.

2 MR. MILLER: Right. They say in other examples it
3 can be elsewhere, but the examiner said you have got to
4 stick with figure 6, and they made an amendment, and so that
5 is what they are stuck with. Even if the spec says that,
6 the prosecution history shows that they were required to be
7 more limited than their disclosure, and because of that they
8 are limited.

9 THE COURT: I see that that may have been what the
10 examiner required of them, but where in the written
11 description is the evacuation end required to be closest to
12 the elevator?

13 MR. MILLER: Let's see.

14 THE COURT: Tell me that first, if there is any
15 place that it says that, and that would help your argument,
16 and then --

17 MR. MILLER: It is that paragraph, that paragraph
18 that we were just looking at --

19 THE COURT: On page what?

20 MR. MILLER: It is --

21 THE COURT: Page 3?

22 MR. MILLER: It is column 7 at the bottom of the
23 patent, the 774 patent. It is appendix page A-65. I am
24 going to read beyond what I have quoted in my argument
25 binder chart. It starts by saying at the bottom of that

1 column, the last paragraph, referring to figure 6, and it is
2 talking about --

3 THE COURT: Hold on. Tell me where you are.
4 Column --

5 MR. MILLER: Column 7. Go down to the very last
6 paragraph where it starts referring to figure 6 --

7 THE COURT: Okay. I'm there.

8 MR. MILLER: That is where it starts to talk about
9 this embodiment in figure 6. It says that the catch trough
10 is in fluid communication with the evacuator. Halfway
11 through that paragraph it says in the example shown the
12 evacuator is joined to an evacuation end of the catch
13 trough. The only place it is used, evacuation end, is
14 referring to figure 6.

15 Now go up to column 8 and go to the second
16 paragraph.

17 THE COURT: You didn't read, however, in other
18 examples the evacuator can be disclosed anywhere along the
19 catch trough.

20 MR. MILLER: Right. It says in other examples, so
21 it is not talking about figure 6 there.

22 THE COURT: Right.

23 MR. MILLER: It is saying alternatively you could
24 do that.

25 THE COURT: Yes.

1 MR. MILLER: That is what they were hoping to get
2 when they filed the application. They were not allowed to
3 get that broad, and --

4 THE COURT: But this does end up in the written
5 description.

6 MR. MILLER: But that was filed in the beginning.
7 The written description does not change when you make
8 amendments to the claims.

9 THE COURT: Okay.

10 MR. MILLER: The claims can be far more narrow
11 than your written description.

12 THE COURT: At some point you need to show me why
13 the claim is as narrow as you say it is.

14 MR. MILLER: Okay.

15 THE COURT: I am with you on 8 now.

16 MR. MILLER: Column 8. Go to about line 10, that
17 paragraph --

18 THE COURT: Yes. In the example shown --

19 MR. MILLER: In the example shown, so they are
20 still talking about figure 6, and that is the example that
21 they are referring to here. In the example shown, the
22 evacuator includes an angled trough connecting the catch
23 trough to the elevator. The angled trough defines an
24 aperture. It is saying that the evacuator is the connection
25 point between the catch trough and the elevator.

1 Now go down to the next --

2 THE COURT: Wouldn't you agree that that is in the
3 preferred embodiment only?

4 MR. MILLER: That is figure 6.

5 THE COURT: And that is the preferred embodiment.

6 MR. MILLER: Yes.

7 THE COURT: But they claim that the claim is
8 broader.

9 MR. MILLER: Well, the claim is not broader. I
10 can go to the claim language to show how they amended it to
11 show --

12 THE COURT: Isn't that what you're going to have
13 to do to convince me?

14 MR. MILLER: Well, first you start with what we
15 talked about in the file history, and the interview summary
16 said the examiner in our interview said you have to limit it
17 to figure 6.

18 THE COURT: Okay.

19 MR. MILLER: Now look at the amendments they made.
20 If you go to page 5 of tab D in my binder --

21 THE COURT: Okay.

22 MR. MILLER: -- this is the prosecution history
23 and it is located at appendix page 103. This is the claim
24 amendment that they made. They added evacuation end of the
25 catch trough, which is the language used to describe the

1 configuration of figure 6 where there is just one evacuation
2 end that everything gets pulled out of, and they added that
3 and then they added that last paragraph. The last paragraph
4 describes a system where the conveyor is pushing stuff
5 towards the evacuator and the debris gets elevated from the
6 evacuator.

7 Now, if the elevator is on the opposite end of the
8 trough and the evacuator, then nothing is getting elevated
9 from the evacuator. Even if you go to the paragraph above
10 the amendment, and go to the paragraph that talks about the
11 elevator, it says that the elevator has to remove debris
12 from the debris collector. Do you see that? The elevator
13 removing debris from the debris collector. That is right in
14 the claim. The debris collector is in that evacuator
15 component. It is the screen. Okay. The elevator removes
16 the debris from that screen. That can't happen if the
17 elevator is not connected to the evacuator. If it is on the
18 opposite end or if the evacuator is somewhere else in the
19 trough, it can't happen and that claim language cannot
20 occur.

21 THE COURT: Well, doesn't that happen in Hydro's
22 alleged infringing device? They have an evacuator, as I
23 understand it, at the opposite end of the elevator.

24 MR. MILLER: Yes.

25 THE COURT: And somehow the debris gets from the

1 evacuator to the elevator. It has to.

2 MR. MILLER: It does, but it is not the elevator
3 that removes it. The elevator is down here. It gets
4 scraped down at this end by the conveyor, and then it gets
5 moved along, and it does not start elevating until it is at
6 the opposite end. You can't say the elevator is removing
7 that debris, because in this patent the conveyor and the
8 elevator and the evacuator are all described as separate
9 components. You can't call the end of the conveyor down
10 here that is going level, that is not part of the elevator.
11 They are separate.

12 THE COURT: What is separate, the elevator and
13 the --

14 MR. MILLER: The conveyor.

15 THE COURT: That is another thing we need to
16 discuss. The first two claim constructions that you want me
17 to construe are evacuation end and then an elevator disposed
18 in fluid communication with the evacuator. I take it that
19 the disagreement between the parties on this one is just a
20 battle over whether the evacuator and the elevator are
21 located right next to each other?

22 MR. MILLER: Yes. And there are two limitations
23 that are really construed to --

24 THE COURT: Together.

25 MR. MILLER: -- to get the same point across.

1 THE COURT: I'm getting an argument on both of
2 them.

3 MR. MILLER: Yes. I'm kind of arguing both of
4 them together.

5 THE COURT: Right. I think they are connected.
6 The word connected I think would help.

7 MR. MILLER: The word joined is in the spec when
8 it is talking about the evacuator being in fluid
9 communication with the catch trough. It also says it is
10 joined to the catch trough.

11 THE COURT: Again, in column 8, farther down, and
12 maybe I'm jumping around, but it says on line 30 in some
13 implementations the elevator includes an elevator housing
14 connected to the evacuator and configured to support a roary
15 driven conveyor for carrying the debris up the inclined
16 elevator housing for dumping at the dump height.

17 What am I to take from the language in some
18 implementations? Doesn't that suggest that there are others
19 where the evacuator and the elevator are not next to each
20 other, right next to each other and on the same end?

21 MR. MILLER: Well, when they originally filed
22 their application, like I said, that written description was
23 written in a way that they -- at the beginning they probably
24 thought more broadly and that it could be in various
25 configurations, right?

1 THE COURT: Okay. So you're going to have to help
2 me understand that, that the prosecution history is enough
3 to read out of the written description those statements.

4 MR. MILLER: Yes, because when you go through the
5 file history, and then the examiner requires you to make
6 amendments and when you make amendments to the claim, you're
7 not allowed to amend your spec and you don't have to cut out
8 the broader disclosure from the specification, but you amend
9 the claim and most times your claims get limited to
10 something more narrow than what the specifications
11 discloses.

12 That is what happened here. They amended the
13 claim, and when you read the description in this claim, you
14 can't read it in a way to have an elevator not connected to
15 the evacuator. It can't be read that way.

16 THE COURT: All right.

17 MR. MILLER: Let me see if I have any other
18 points.

19 One more point to make on that part of the
20 specification that you pointed to. When it is talking about
21 figure 6 --

22 THE COURT: Ironically you're sounding like you
23 are echoing Mr. Lobbin. Judge, just read the claim and it
24 means what it says, and if the specification language is
25 different, you can't read that into the claim.

1 MR. MILLER: Well, you can't broaden your claim
2 when you have narrowed it during prosecution.

3 THE COURT: It is the prosecution history that you
4 think makes a difference here, all the difference?

5 MR. MILLER: The prosecution history --

6 THE COURT: Without that telephone call then you
7 wouldn't have your argument?

8 MR. MILLER: No, I think the argument is there
9 just on the plain language of the claim, too. How does the
10 elevator remove debris from the debris collector within that
11 evacuator --

12 THE COURT: All right.

13 MR. MILLER: -- if they are on opposite ends?

14 THE COURT: I know I have asked this before, but
15 in the written description which you're telling me does not
16 ever get amended, even though the claim gets amended, it
17 does seem to suggest that this invention, to someone reading
18 it, of ordinary skill in the art, would see that, well, I
19 can configure this differently than that preferred
20 embodiment.

21 MR. MILLER: If the claim didn't have the language
22 that said the elevator removes it from the debris collector,
23 then it would be described more broadly in the claim and
24 that would have been supported by the spec. They didn't
25 draft the claim as broadly as their spec. They just didn't.

1 The claim itself says the elevator removes debris from the
2 debris collector, and that is required, which means the
3 elevator has to be joint with the debris collector.

4 THE COURT: But that language was in the claim
5 before the amendment.

6 MR. MILLER: It was. It was. It was there. They
7 were already pretty narrow. After the amendment they made
8 more narrowing amendments. They got even smaller than their
9 specs. But that language also shows that you have to have
10 them connected.

11 THE COURT: Well, then why did the examiner have
12 to tell them to do anything at all if it was already that
13 narrow? In the conversation it sounds like he was telling
14 them to do what they had already done. If the elevator
15 removing debris from the debris collector was already
16 indicating, unquestionably, that the evacuator end was
17 adjacent to -- now I'm using adjacent -- was connected to
18 the elevator.

19 MR. MILLER: Well, I have had interviews with
20 examiners before and oftentimes they say, listen, this is
21 what you need to do. You say it is already kind of that
22 narrow. Look at this claim limitation. Look at this claim
23 limitation. They say, well, you have to narrow it down a
24 little bit more in this respect and in this respect. Even
25 though you have a point, you still made narrowing

1 amendments.

2 What the public has notice of in this file is the
3 examiner said you limit your claim to figure 6. They made
4 some additional amendments that are clearly related to
5 figure 6 configuration. You read the claim as a whole. It
6 does not make sense and you cannot read it to apply to
7 something where the evacuator and the elevator are on
8 opposite ends. It can't be read that way.

9 THE COURT: Why don't they require the written
10 description to get cleaned up so it's consistent with what
11 the examiner wanted?

12 MR. MILLER: I don't know. That is the patent
13 system that we have. That might be a better system.

14 THE COURT: It is like internally inconsistent.

15 MR. MILLER: That is why we have to analyze not
16 just --

17 THE COURT: Now you're talking Mr. Lobbin's way
18 and Mr. Ford, just look at the claim --

19 MR. MILLER: No.

20 THE COURT: -- the claim language.

21 MR. MILLER: No, that is why you have to look at
22 the entire intrinsic evidence, including the file history,
23 because you have to have an understanding that you start
24 with the application as drafted, but then there is this big
25 process that lasts three or four, or, for one of these

1 patents, six years, talking to the examiner back and forth.

2 What you get out in the claims is what your
3 protection is, and that is always more narrow than what you
4 disclosed in the spec. The spec always says that there are
5 always these other options and embodiments, but you're
6 always making claim amendments to get what the examiner will
7 allow you to have.

8 That is why you can't just read the claim language
9 and then run to the dictionary and ignore the intrinsic
10 evidence. You have to read the claim language and you read
11 the spec, but you also read the file history. If the file
12 history shows something that says you don't get the full
13 breadth of what you said in the spec, then that is what you
14 get.

15 THE COURT: How does the elevator remove the
16 debris from the evacuator? How is that different from the
17 conveyor?

18 MR. MILLER: The claim just says the elevator
19 removes debris from the debris collector.

20 THE COURT: Right. How does it do that?

21 MR. MILLER: It has got some way to do that.

22 THE COURT: What is the elevator, just the thing
23 that goes up?

24 MR. MILLER: The elevator is that housing in the
25 spec, that housing that goes up.

1 THE COURT: But what does housing mean? Is that a
2 conveyor?

3 MR. MILLER: The housing is just that frame
4 that --

5 THE COURT: Just that thing?

6 MR. MILLER: Just the thing.

7 THE COURT: That is an elevator?

8 MR. MILLER: Here is one of the confusing things
9 about this patent. It talks about the elevator performing
10 functions. The elevator elevates debris. It does not say
11 wherein --

12 THE COURT: Does it elevate debris or allow debris
13 to be elevated?

14 MR. MILLER: It says the elevator, removing debris
15 from the debris collector, and elevating the removed debris
16 from a collection height to a dump height. I would point
17 out that the word collection height in the spec in column 8,
18 around line 38, says that the collection height is at the
19 evacuator, so that goes perfectly in-line with the rest of
20 this claim where the point of elevation begins at the
21 evacuator.

22 Maybe that is the main point. When you read this
23 claim, when debris starts to be elevated, whether it is the
24 conveyor or some other means within the elevator, when the
25 debris starts to be elevated, this claim expressly says at

1 every point that is being elevated from the evacuator. The
2 point of elevation begins at the evacuator.

3 Now, if the evacuator is here and you have a
4 trough, and then you have an elevator over here, it is not
5 being elevated from the evacuator, and that is what the
6 claim says plainly is the elevator removes debris from the
7 evacuator and the conveyor elevates the debris from the
8 evacuator. Every time you are talking about elevating, the
9 words from the evacuator or from the debris collector, which
10 is part of the evacuator, are used. That is the origin of
11 the elevating point is from the evacuator.

12 Honestly you don't even need a spec or the
13 prosecution history to get that point that it starts at the
14 evacuator, the elevating, but the spec and the prosecution
15 history reinforce that and give the public notice that that
16 is the only way you infringe this patent.

17 THE COURT: So I'm taking that as an argument on
18 both of the first two claim terms in the 774 patent.

19 Mr. Ford?

20 MR. FORD: Yes.

21 Number one, I just want to point out, and I know
22 we have gone over the law of claim construction, but
23 Mr. Miller made a statement about dictionaries that is just
24 not accurate. He said that dictionaries are a last resort.
25 In the Phillips case the Federal Circuit said a judge who

1 encounters a claim term while reading a patent might consult
2 a general purpose or specialized dictionary to begin to
3 understand the meaning of the term before reviewing the
4 remainder of the patent to determine how the patentee has
5 used the term. That is just not right. It is just not
6 right that it is a last resort and not to be consulted
7 first.

8 Secondly, Mr. Miller is making the argument that
9 the examiner during this phone interview required the patent
10 owner to make a specific amendment. I was trying to quote
11 him. He said the examiner said you have to limit it to
12 figure 6 and that the examiner required it to be limited to
13 figure 6.

14 THE COURT: Well, now he is saying that he does
15 not even need figure 6.

16 MR. FORD: Right. I will move on to the claim
17 language, but to address that point, if you look first at
18 their motion for claim construction on page 26, they say the
19 patent office examiner required Petter to limit the claims
20 to the specific configuration depicted in figure 6. Compare
21 that with what they say in their responsive brief, and they
22 back off of the strength of that assertion a little bit, and
23 in their response they say, well, the examiner expressly
24 requested that the claims be limited to the configuration
25 shown in figure 6. That is on page 11 of their response

1 brief.

2 Originally they say, oh, the examiner required it,
3 and then they back off that a little and say, no, they just
4 requested it. If you read that part of the prosecution
5 history, there is no requirement and the examiner is not
6 telling the patent owner what he has to do. That is not how
7 the prosecution system works. It is a back-and-forth
8 system. The examiner makes suggestions and the patent owner
9 then makes some amendments that either conform to or don't
10 necessarily conform to those suggestions, and that is how
11 the process works.

12 Our position is that the examiner made a
13 suggestion that the patent owner decided, do you know what,
14 I don't think I need to go that narrow.

15 Mr. Miller tries to argue that you don't even need
16 to look at the prosecution history because the claim
17 language itself is so clear that the evacuator -- let's see
18 here -- he makes the argument that the plain language of the
19 claim requires that the elevator and the evacuator be on the
20 same side of the trough, and that it excludes any reading
21 that would allow the elevator and the evacuator to be on
22 opposite sides.

23 He cites principally to support this the fact that
24 the claim says that there is an elevator that removes debris
25 from the debris collector and elevates the removed debris

1 from a collection height to a dump height for dumping. The
2 next limitation reads a conveyor disposed along the catch
3 trough, and the elevator -- disposed along the catch trough
4 and the elevator, the conveyor moving at least one of the
5 wash fluid and the debris collected in the catch trough to
6 the evacuator, and elevating the debris from the evacuator
7 to the dump height. It simply does not require that the
8 elevator and the evacuator be on the same side of the
9 trough.

10 I'm going to do my best to paint a picture for you
11 of how this would work. You have an elevator, like a shaft,
12 and within that elevator there is a conveyor. That conveyor
13 extends not only the length of the shaft of the elevator,
14 but it also extends through the trough. So there are maybe
15 some wheels that turn, and you have a conveyor system that
16 makes something like an L shape that goes around the trough
17 and up the elevator and back down, and it grabs the debris
18 from inside of the trough and takes it over to the elevator
19 and lifts it up and dumps it. This conveyor has little tabs
20 on it and it grabs the dirt as it goes.

21 Well, as it is going this way, so you have the
22 elevator on this side, and you have the evacuator on this
23 side, and liquid being taken off over here and solids being
24 taken off over here. You have a screen on one end that
25 prevents the debris from clogging up the evacuator where the

1 liquid escapes. Like I said, part of this conveyor is you
2 have these little flanges that grab that debris, and first
3 of all it pushes it over there because it is going in a
4 circle, and it pushes it towards the evacuator, both the
5 debris and the liquid to be honest, and then it comes around
6 the bottom and the liquid will go through the screen but it
7 continues to grab the dirt --

8 THE COURT: The solids.

9 MR. FORD: -- and up the elevator. That is
10 perfectly consistent with what is recited in the claim.
11 Perfectly consistent.

12 Again, the conveyor is moving at least one of wash
13 fluid and debris. I would suggest that in that example it
14 is moving both. Collected in the catch trough to the
15 evacuator, again, to the side where the evacuator is, and
16 then elevating that debris from the evacuator to the dump
17 height. It comes back around and up the elevator and
18 deposits it somewhere.

19 I also wanted to point out briefly, and this
20 argument Mr. Lobbin is going to make, but in fluid
21 communication does not mean joined directly. In fluid
22 communication could be a tube that connects two things that
23 allow liquid to pass through. I say that just because they
24 have touched on that, but I will allow Mr. Lobbin to address
25 that claim term more thoroughly.

1 THE COURT: Thank you, Mr. Ford.

2 MR. MILLER: Can I address that point, Your Honor?

3 THE COURT: Yes.

4 MR. MILLER: The example that Mr. Ford explained
5 showed an example where it was not the elevator that was
6 removing the debris from the evacuator. It was the portion
7 of the conveyor that runs through the catch trough. It is
8 important to look at their patent. How are they describing
9 the components of their patent? If you look at figure 1-D
10 in the 774 patent, and it is on appendix page 45, their
11 patent describes this system and the various components or
12 various kinds of areas, and number 230 in figure 1-D is
13 called the catch trough. That whole section there, 230,
14 that is the catch trough.

15 Then section 320 in figure 1-D, that is the
16 evacuator housing. Number 330 is the elevator housing.
17 Then they say there is a conveyor that runs through both the
18 catch trough area and the elevator area, but the claim says
19 that the debris is elevated from the evacuator. If that
20 evacuator, number 320, is down at this other end, then the
21 debris is not being elevated from that evacuator. It is
22 being elevated from the catch trough, because the evacuator
23 is way down here, and the elevator is only 330, only that
24 section, so his example did not square with the claim
25 language at all.

1 THE COURT: When it says that the elevator will
2 remove debris from the debris collector, how do you define
3 debris collector? What does that mean?

4 MR. MILLER: If you look at the claim it talks
5 about the evacuator having a debris collector and a fluid
6 mover. It is a component of the evacuator assembly. It is
7 the screen. The fluid mover is the pump and the debris
8 collector is a screen. Those two components are part of the
9 evacuator assembly that has to be separate from the catch
10 trough. That is what the prosecution history shows us. The
11 elevator has to elevate things from that evacuator assembly,
12 not from the opposite end of the trough, and not from the
13 trough, but from the evacuator assembly. That is how it is
14 elevated and the claim language says that.

15 THE COURT: This entire dispute among you embraces
16 all three of the claim terms you want the Court to construe
17 under the 774 patent, doesn't it? The third one is just the
18 elevator removing the debris from the debris collector --

19 MR. MILLER: Yes.

20 THE COURT: -- and elevating the removed debris
21 from a collection height to a dump height for dumping.
22 Aren't we arguing the same thing with all three of these
23 construction issues?

24 MR. MILLER: Well, the point of the third claim
25 limitation that we're talking about -- it is really the

1 first two, the evacuation end and the elevator in fluid
2 communication --

3 THE COURT: Yes.

4 MR. MILLER: -- and those two are this point that
5 we have been arguing.

6 THE COURT: Yes.

7 MR. MILLER: The third one and the reason that we
8 put that in there is if you read this claim, it says that
9 the elevator elevates debris, and then down in the next
10 section where it talks about the conveyor, it says that the
11 conveyor elevates debris, and it does not say that the
12 conveyor is the means within the elevator to elevate debris.
13 It describes two different, independent mechanisms that
14 elevate debris in the claim. I don't know what the one in
15 the elevator is, it just says that this elevator component
16 elevates debris, and then it says that the conveyor elevates
17 debris.

18 THE COURT: Doesn't the --

19 MR. MILLER: It was drafted confusingly, but the
20 plain language and on its face there are two elevating
21 means, and so we raise the third point just to say that that
22 is a means of elevation independent of the conveyor.

23 THE COURT: I don't know how the debris gets to
24 the top of the elevator shaft other than by a conveyor.

25 MR. MILLER: Well --

1 THE COURT: I thought it was the same conveyor
2 belt or whatever the mechanism is.

3 MR. MILLER: When you read the claim, candidly
4 that is what you would think, but you read the claim and it
5 talks about two means of elevating. When it talks about the
6 conveyor it does not say wherein the conveyor is the means
7 of elevating in the elevator. It says the elevator elevates
8 means and the conveyor elevates means. I don't understand
9 it. It is not drafted well.

10 THE COURT: Elevates debris.

11 MR. MILLER: Elevates debris. Sorry.

12 That limitation is not the most important that we
13 are seeking claim construction on out of this patent. It is
14 the other ones where you're talking about --

15 THE COURT: Where you want the evacuator end right
16 next to the elevator?

17 MR. MILLER: Yes, because otherwise you are not
18 elevating anything from the evacuator unless that elevator
19 and evacuator are joined.

20 THE COURT: Thank you, Mr. Miller.

21 Any response to that?

22 MR. LOBBIN: Thank you, Your Honor.

23 The last claim term is this conveyor and elevator
24 distinction and, frankly, their proposal would violate that
25 principle that we talked about earlier today, when I first

1 got up here, of claim construction, and that would exclude
2 the preferred embodiment. It is clear from the patent
3 specification that it is exactly as Your Honor pointed out,
4 that there is a conveyor, as Mr. Ford describes, that runs
5 along the trough and up the elevator and back and through
6 and it is one conveyor.

7 For Hydro to suggest that, well, we can't
8 understand this claim and it seems to suggest that there are
9 two separate mechanisms, that would exclude the preferred
10 embodiment and that can't be correct. In fact, when you
11 look at the specification of the patent, it clarifies any
12 confusion over this by saying that the conveyor system also
13 includes a conveyor disposed along the catch trough and the
14 elevator. The conveyor moves at least debris along the
15 catch trough at the collection height and elevates the
16 debris to a dump height for dumping. It is clear that the
17 conveyor mechanism is the sole mechanism through which all
18 of this takes place. The fluid and the debris are moved
19 around a catch trough, moved up the elevator, and that is
20 the only construction that would make sense, not theirs that
21 would read out and exclude the preferred embodiment. That
22 is at column 3, lines 38 to 45.

23 Even figure 6 itself, figure 6 that they cite to,
24 fails to show an independent mechanism for elevating debris.
25 Instead, the elevator and the conveyor, which are positioned

1 along the elevator, together elevate the debris to a dumping
2 height. Hydro's proposed construction is simply too narrow.

3 THE COURT: I take it you're saying that the
4 references in the claim language that the elevator elevates
5 does not mean that literally, it means that the conveyor is
6 elevating within the elevator?

7 MR. LOBBIN: Exactly.

8 THE COURT: Okay.

9 MR. LOBBIN: We could go through a semantic
10 exercise and perhaps find --

11 THE COURT: That is what we have been doing all
12 afternoon.

13 MR. LOBBIN: Yes, but in this particular claim,
14 and we could find some discontinuity. Yes, we would love to
15 look to the specification to provide some clarity here,
16 because it shows that their construction can't be correct,
17 because it would exclude the preferred embodiment, and you
18 construe patent claims not to find little nits that would
19 say, oh, this can't be, it is internally inconsistent, and
20 you construe patent claims to preserve their validity.

21 THE COURT: I believe you just told me that I can
22 use the specification to provide clarity.

23 MR. LOBBIN: In this instance, yes, but you can't
24 do what I told you at the first to --

25 THE COURT: I can't go too far.

1 MR. LOBBIN: Beware of the cardinal sin.

2 THE COURT: Thank you, Mr. Lobbin.

3 MR. LOBBIN: Thank you, Your Honor.

4 THE COURT: Any final words, Mr. Miller?

5 MR. MILLER: No.

6 THE COURT: All right. Well, I will try to get
7 something out in a written opinion fairly soon.

8 I guess I have pending a couple of motions for
9 summary judgment from the defendant.

10 With that, I think we are done. Thank you for
11 your patience and thank you for your arguments. They have
12 been very helpful.

13 MR. MILLER: Thank you, Your Honor.

14 THE COURT: Court is in recess.

15 (Proceedings concluded.)
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